Supreme Court, U.S.
FILED
JAN 22 2008
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No. 07-980

IN THE
Supreme Court of the United States

MICHAEL FOGARTY AND TERRIE FRITZ,
Petitioners,

v.

ALFRED MILTON EVANS, SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC., RUSTLING WINDS, INC., MORNING STAR MENTAL HEALTH SERVICES, INC., DIVERSIFIED FAMILY SERVICES, INC., SERENITY SPRINGS MENTAL HEALTH SERVICES, L.L.C., JCH, INC., NEAL THRIFT, NANCY GRAVES-THRIFT, JOHN MAJORS, CYNTHIA MAJORS, CHARLES PARKHURST, MARY PARKHURST, LEROY WHEELER, AND JOEL HOLCOMB,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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January 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Petitioners are officials with responsibilities for administering the Oklahoma Medicaid program who were sued by respondent Medicaid providers and are now facing millions of dollars in personal liability, and a third trial, as a result of the Tenth Circuit's reinstatement of a jury verdict that was set aside by the district court as against the weight of the evidence.

The questions presented are:

1. Whether the Tenth Circuit was correct to hold, in conflict with three other courts of appeal, that a qualified immunity defense is waived for all purposes if not raised in the pretrial order?

2. Whether the Tenth Circuit was correct to reverse the district court's grant of a new trial by applying a "more stringent scrutiny" than the abuse of discretion standard used by five other Circuits?

3. Whether the Tenth Circuit erred in reinstating a punitive damages award even though it remitted or remanded the bulk of compensatory damages as being "speculative, remote, imaginary, or impossible of ascertainment" and "so excessive as to shock the judicial conscience"?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the court of appeals were Petitioners, Respondents, and Dana Brown, who was a codefendant/appellee/cross-appellant with Petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit. The decision below subjects state officials attempting to control spiraling Medicaid costs to millions of dollars in personal liability and, unless corrected, threatens the ability of public servants like Petitioners to administer state programs effectively and without fear of personal retribution.

The Tenth Circuit held that state officials with responsibilities for administering the Oklahoma Medicaid program waived their qualified immunity from suit by failing to include the defense in the pretrial order, even though they had already moved to dismiss the case on qualified immunity grounds and asserted it as an affirmative defense in their answer.

The Tenth Circuit then applied "more stringent scrutiny," rather than the ordinary abuse of discretion standard, to reverse the district court's grant of a new trial, thereby reinstating a jury verdict against petitioners that the trial court had set aside as against the weight of the evidence.

The Tenth Circuit's opinion conflicts with the decisions of other courts of appeals, and is in tension with decisions of this Court, in several respects. *First*, the court of appeals' decision holding Petitioners' qualified immunity defense waived because it was not included in the pretrial order conflicts with at least three other courts of appeals, which have held that the defense is not waived in the circumstances here. The Tenth Circuit's decision is

particularly egregious as it fails to take into account the longstanding rule that while an order denying qualified immunity may be appealed immediately, the defense is not waived if no appeal is taken.

Second, the Tenth Circuit's decision to apply "more stringent scrutiny" to review the district court's grant of a new trial deepens an existing split among the courts of appeal as to the appropriate standard of review when a district court determines that a jury's verdict is against the weight of the evidence.

Finally, both of these errors are compounded by the court's reinstatement of the jury's award of nearly $1 million in punitive damages against petitioners personally—which under Oklahoma law will not be covered by insurance, nor indemnified by the State—even as it remitted or remanded the bulk of compensatory damages as being "speculative, remote, imaginary, or impossible of ascertainment" and "so excessive as to shock the judicial conscience."

Each of these aspects of the decision below disregards the difficulties faced by public servants tasked with administering costly and complex government programs, and together they call for review and correction by this Court.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-53a, and the judgment of the district court, App., *infra*, 56a-97a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2007. App., *infra*, 1a. A petition for rehearing en banc was denied on Oct. 23, 2007. App., *infra*, 54a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners were sued in their personal capacity under 42 U.S.C. § 1983. That section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress * * *.

STATEMENT OF THE CASE

Petitioner Mike Fogarty is the Chief Executive Officer of the Oklahoma Health Care Authority ("OHCA") which oversees Oklahoma's Medicaid program, and Petitioner Terrie Fritz is the Director of Behavioral Health for OHCA. App., *infra*, 3a. Respondents are individuals and private corporations that provide behavioral and mental

health services and have elected to participate in Oklahoma's Medicaid program. *Id.*

1. Oklahoma's Medicaid Cost Savings Measures.

In the 1990s, Oklahoma experienced a sharp increase in the cost of mental health services paid to private providers through its Medicaid program. App., *infra*, 76a. Between 1994 and 1997, Medicaid funds paid to these providers rose 700%, from $3.1 million to $22.1 million. *Id.* at 4a. In an effort to stem spiraling costs and prevent fraud, mismanagement, and substandard services, the state established "a system of prior review and authorization for mental health services." *Id.* at 76a.

OHCA contracted with the Oklahoma Foundation for Medical Quality ("OFMQ") to perform the prior approvals according to medical necessity standards. *Id.* "An approved provider would prepare a proposed treatment plan for each of its patients or clients and could submit that to OFMQ. All private providers in Oklahoma were required to get prior authorization from OFMQ as a precondition to reimbursement for services rendered." *Id.*

Respondents, as private mental health services providers, were subject to the prior authorization and review procedures. In 1998, Respondents and other private mental health providers formed an association to lobby the state legislature on their behalf. *Id.* at 4a, 58a. The association, along with certain individual Respondents, was successful in some of these lobbying efforts, but was unsuccessful in others. *Id.* at 4a-6a.

2. The litigation. This case arises from two suits filed by Respondents under 42 U.S.C. § 1983, alleging various causes of action against Petitioners in their individual and official capacities, along with members of the OHCA board of directors in their official capacities, and OFMQ. *Id.* at 5a n.3, 6a. Among their other claims, Respondents alleged that Petitioners "retaliated against them in various ways because of their lobbying or political activities." *Id.* at 58a.

In their answers to both cases, Petitioners asserted as an affirmative defense that they are entitled to qualified immunity. Petitioners then moved to dismiss both cases on qualified immunity grounds. *Id.* at 16a-17a n.9. The court denied the motions on the ground that Respondents alleged a violation of a constitutional right against retaliation for their speech about Oklahoma's Medicaid program, and that the right was clearly established. *Id.* at 118a. Petitioners did not immediately appeal that decision.

The district courts in both cases then dismissed "all claims other than plaintiffs' First Amendment retaliation claim." *Id.* at 7a n.6; 57a n.1. The cases were consolidated and tried on that claim alone. *Id.* at 7a.

3. The first trial and the district court's grant of a new trial. The first trial in this case was held in April, 2003. *Id.* at 58a. The crux of respondents' evidence in support of their claim of retaliation for their lobbying activities was that, on average, they were approved for several dollars less per "unit of service" than other providers. *Id.* at 21a. That evidence did not analyze the different rates at

which services were billed, compare the amount approved to what had been requested, or examine reimbursement levels prior to the lobbying efforts that respondents contended had led to retaliation. The respondents sought damages equal to "lost revenue" had their "units of service" been paid at a higher rate.

The jury returned a verdict holding Petitioners personally liable for compensatory damages totaling $24,000,000 to the corporate plaintiffs and $9,095,000 to the individual plaintiffs. *Id.* at 8a. The jury awarded an additional $1,350,000 in punitive damages. *Id.* at 98a-99a. Of the compensatory damages award, $19,857,000 was awarded against Mr. Fogarty and $8,883,500 against Ms. Fritz.[1] *Id.* at 8a. Punitive damages were assessed at $450,000 against each Petitioner. *Id.*

The district court granted Petitioners' motion for a new trial. The court concluded "that the verdict returned by the jury in this case is unsupportable under the evidence and applicable law and must be set aside in its entirety." *Id.* at 99a. The court stated that it was "reluctant to disturb the jury's determination," but found that "the jury's verdict and determination is in error, is not supported by the evidence, and must be overturned." *Id.* at 100a.

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[1] The remainder was awarded against Dana Brown, OHCA's legislative liaison, who was a defendant along with Petitioners throughout this litigation until the court of appeals concluded that "it was error for the district court to deny JMOL to Brown as to all plaintiffs following the first trial." App., *infra*, 38a.

The court held that "much of the evidence offered to establish retaliatory activity by defendants Fogarty, Fritz and Brown bordered on pure speculation and, in some instances, was based on little more than proof that the particular defendant was a supervisor of some activity at OHCA." *Id.* at 100a-101a. The court correctly noted that "[a]n individual defendant's liability in a § 1983 action may not be based on the doctrine of respondeat superior, but must be based on that individual's personal participation in the wrongful activity." *Id.* at 101a; *see also Bd. of the County Comm'rs* v. *Brown*, 520 U.S. 397, 403 (1997) (Section 1983 "'cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor,'" quoting *Monell* v. *New York City Dept. of Social Servs.*, 436 U.S. 658, 689 (1978)).

The court also found that the evidence was insufficient to support the jury's $33 million damages award. The court held that "[t]he only basis" that the jury could have relied on was to accept "the impact of the claimed disparity in reimbursement rates" between plaintiffs and other providers. App., *infra*, 101a. Because Respondents "made no effort to quantify the economic losses of each corporate plaintiff," the court held that "[t]he amount of damages awarded to each particular corporate plaintiff is thus without sufficient support in the evidence." *Id.* at 102a. The court also held that the evidence did not support the verdict because it was based on the corporate plaintiffs' gross revenues, rather than their lost profits. *Id.* at 104a. Finally, the court held that the awards to individual

plaintiffs for emotional distress, which ranged from $295,000 to $3 million, were not supported by substantial evidence, shocked the judicial conscience, and therefore were "plainly excessive." *Id.* at 104a-105a (citing *Wulf* v. *City of Wichita*, 883 F.2d 842, 874-75 (10th Cir. 1989)).

The court ordered a new trial "with considerable reluctance," noting that "[a]ny jury verdict is entitled to substantial deference from the Court and should be set aside only where the need to do so is clear." The court nevertheless held that "a new trial is necessary and appropriate under the circumstances of this case." *Id.* at 107a.

4. The second trial and the district court's grant of judgment as a matter of law. Following the district court's grant of a new trial, Petitioners sought leave to file a motion for summary judgment on qualified immunity grounds. The district court denied the motion on the grounds that "the pretrial order entered in the case did not preserve or assert the defense of qualified immunity." App., *infra*, 10a.

On appeal, the Tenth Circuit held that it lacked appellate jurisdiction. *Id.* at 11a; *Evans* v. *Fogarty*, 123 F. App'x 863, 865 (10th Cir. Jan. 26, 2005) (unpublished). The court stated that the district court's order "did not address any qualified immunity issue. It was simply a pretrial order denying defendants' request to file a motion." 123 F. App'x at 865. The court stated that "[d]efendants will have a full opportunity to address any properly preserved qualified immunity issue on appeal from the adverse jury verdict reached in, and any adverse

post-trial rulings with respect to, the second trial." *Id.*

In the second trial, the jury found in favor of Respondents and against Mr. Fogarty, awarding a total of $1,020,000 in damages to individual plaintiffs and $14,295,000 to the corporate plaintiffs. App., *infra*, 58a. The jury held in favor of Ms. Fritz against all but two plaintiffs, who were awarded a total of $575,000. *See id.* at 59a. The jury also awarded $300,000 in punitive damages against Mr. Fogarty and $7,500 against Ms. Fritz. *Id.*

On Petitioners' motions for judgment as a matter of law, the court held that the "critical issue" was whether there was sufficient evidence "from which the jury could have reasonably concluded that Fogarty took adverse action against" Respondents. *Id.* at 64a. The court held that showing that a defendant head of an agency who had "serious disputes or disagreements with a plaintiff," combined with "evidence that the plaintiff was treated unfavorably by the agency" was "not enough" to support an inference that the defendant caused the plaintiff's harm. *Id.* at 65a. "To hold otherwise would be inconsistent with the principle that a supervisor is not liable for the actions of subordinates merely because of his position." *Id.* at 65a-66a.

With the exception of certain "alleged threatening and defamatory statements" by Mr. Fogarty, the district court found that "the evidence simply was insufficient to support an inference that Fogarty took adverse or retaliatory action against the [individual] plaintiffs." *Id.* at 70a, 72a. The court noted that "[m]uch of plaintiffs' evidence

related to complaints with the Medicaid system (or provider reimbursement system) generally." *Id.* at 67a. The court held that while Oklahoma's "efforts to control the growth in the cost of mental health services" resulted in burdens on the plaintiffs, "[t]here was not . . . evidence from which a jury could have reasonably concluded that these circumstances were due to Fogarty trying to single out and punish the plaintiffs — these facts and circumstances applied to all private providers." *Id.* at 67a-68a.

Regarding the corporate plaintiffs, the court rejected the so-called "disparity evidence" purporting to show that the plaintiffs received smaller reimbursements per "unit of service" on average than other providers. *Id.* at 79a. The court found that "even if the disparity evidence was sufficient to prove that someone treated [the corporate plaintiffs] unfairly, it does not support the further inference that Fogarty was the person doing so." *Id.* Further, "there was no evidence that this 'disparity' in reimbursement levels occurred after and because of plaintiffs' protected First Amendment activities." *Id.* Moreover, the court held that "the proffered evidence failed to support the inference that the corporate plaintiffs were, in fact, similarly situated to the mental health services providers" whose reimbursement rates were allegedly higher. *Id.* at 81a. Accordingly, the court granted Mr. Fogarty's motion for judgment as a matter of law as to the corporate plaintiffs. *Id.* at 92a.

The court also granted Ms. Fritz's motion for judgment as a matter of law in its entirety. It held that "[a]s with Fogarty, there was no evidence that Fritz told OFMQ to cut" a provider's approved units,

slow the processing of its requests, or take adverse action of any sort, nor was there any evidence "that Fritz's actions caused or contributed to the 'disparity' in reimbursements compared to other providers." *Id.* at 94a. The fact that Ms. Fritz's duties included dealing with OFMQ was "not enough to support an inference that Fritz in fact used her power or position to harm" a provider. *Id.* The Court concluded that there was insufficient evidence "from which the jury could have reasonably concluded she took some adverse or retaliatory action" against either of the two plaintiffs to whom damages had been awarded against Ms. Fritz. *Id.* at 93a-96a.

5. The Court of Appeals' Opinion. Respondents appealed from the district court's order granting judgment as a matter of law, and from the district court's 2003 order granting a new trial.[2] App., *infra*, 14a. Petitioners cross-appealed, seeking judgment as a matter of law as to all plaintiffs. *Id.* In their appeals, Petitioners again asserted that they were entitled to qualified immunity from suit.

In a footnote, the Tenth Circuit held that Petitioners had waived their qualified immunity defense. *Id.* at 16a-17a n.9. The court acknowledged that Petitioners moved to dismiss Respondents' claims on qualified immunity grounds before the first trial, and that "[t]hose motions were denied." *Id.* Nonetheless, the court held that "[d]efendants must diligently raise the defense during pretrial

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[2] Respondents also appealed from the district court's attorneys' fees award. App., *infra*, 14a.

proceedings *and ensure it is included in the pretrial order.*" *Id.* (emphasis added).

The Tenth Circuit then reversed the district court's 2003 decision to grant a new trial. The court of appeals held that the standard of review when a district court *denies* a motion for a new trial is abuse of discretion. *See id.* at 15a. "Yet when appellate review is of a district court's *grant* of a new trial, we subject that decision to more stringent scrutiny in order that the district court's judgment not be substituted for the jury's." *Id.* at 15a-16a (emphasis added). The court held, "'[t]his is particularly true when the motion is granted on the ground that the verdict is against the weight of the evidence.'" *Id.* at 16a (quoting *Hutchinson* v. *Stuckey*, 952 F.2d 1418, 1421 (D.C. Cir. 1992)). In such cases "'close scrutiny is required in order to protect the litigants' right to jury trial.'" *Id.* at 16a, quoting 952 F.2d at 1421.

After "wad[ing] through the evidence presented at the first trial," *id.* at 19a, the court recognized "the validity of the district court's concerns with respect to the admittedly imperfect disparity evidence," and "share[d] the district court's skepticism about the evidence offered with respect to retaliatory audits." *Id.* at 28a, 31a. Nevertheless, the court concluded based on its own review of the paper record, without the opportunity to evaluate the credibility of the witnesses, that there was some circumstantial evidence to support a finding of retaliation, and it reversed the district court's new trial grant, reinstating the first trial verdict as to Petitioners. *Id.* at 53a.

The court ordered remittitur, however, with regard to all but $450,000 of the compensatory

damages awarded to the individual Respondents, finding that the awards "are so excessive as to shock the judicial conscience." *See id.* at 41a-47a. With the exception of $265,500 awarded to one plaintiff (which was remitted to nominal damages), the court did not set the amount of the remittitur. *Id.* at 44a-46a. The court did, however, note that the two-thirds reduction ordered in a different case might provide guidance. *Id.* at 45a. If the district court accepted the court of appeals' suggestion, Petitioners would still be liable for nearly $3 million in compensatory damages.

The court remanded for yet a third trial on the corporate plaintiffs' damages. The court found that Respondent's expert's testimony on lost profits "was not simply imprecise – rather, it had the air of fantasy," and that in order to accept the expert's calculations, a juror "would have to make a series of outlandish assumptions that find little support in the record." App., *infra*, 51a.

Despite rejecting nearly all of the original $33 million compensatory award as either unsupported by the evidence or shocking to the judicial conscience, the court of appeals reinstated *all* of the $900,000 punitive damages award against Petitioners. *See id.* at 49a.[3]

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[3] The original $1.35 million punitive damages award was divided equally among Petitioners and their co-defendant, Ms. Brown. App., *infra*, 8a.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's opinion imposes continuing litigation and ruinous personal liability on state officials who were simply doing their job—exactly the results that the qualified immunity doctrine seeks to avoid. Its cursory conclusion that immunity had been waived conflicts with the decisions of other courts of appeals and is in tension with accepted principles of qualified immunity established by this Court.

The court of appeals' application of a heightened standard of review to the grant of a new trial is likewise contrary to this Court's decisions and exacerbates an existing conflict among the courts of appeals.

Finally, the court's reinstatement of nearly $1 million in punitive damages against individual state officials who will be personally liable also merits review.

I. The Tenth Circuit's Opinion Creates A Split Among The Circuits On Whether Qualified Immunity Is Waived If Not Included In a Pretrial Order.

The Tenth Circuit held in this case that Petitioners' qualified immunity defense was waived because it was not included in the pretrial order. This holding conflicts with the decisions of three other courts of appeals. It is directly contrary to the position taken by the Seventh Circuit, which has held that any affirmative defense already raised and ruled upon by the trial court need not be raised in the pretrial order in order to be preserved for appeal.

The decision also conflicts with decisions of the First and Fifth Circuits, which have held that qualified immunity is not waived by the failure to include it in the pretrial order.

Contrary to the Tenth Circuit's opinion, the Seventh Circuit has held that failure to include a defense in the pretrial order did not waive the defense where the issue was rejected in motions practice prior to trial. *Calderon* v. *Witvoet*, 999 F.2d 1101 (7th Cir. 1993). At issue in *Calderon* was whether defendant farm owners in a Fair Labor Standards Act suit had waived the right to present an affirmative defense limiting liability based on the FLSA's three-year statute of limitations. *Id.* at 1108. The farm owners had pleaded the statute of limitations in their answer, and then "relied on the statute in opposition to the plaintiffs' motion for summary judgment." *Id.* The district court granted the motion "without discussing this defense." *Id.* "The only explanation the district court gave for including [3 years before the statute began to run] in this award was that the [farm owners] waived the defense of the statute of limitations by not listing it in the final pretrial order as a subject requiring decision." *Id.*

On appeal, the Seventh Circuit held that "[n]othing in the Rules of Civil Procedure tells counsel that to preserve issues for appeal they must insert into the pretrial order contentions that have already been rejected by the judge." *Id.* It remarked that it was "no surprise" that the farm owners "did not attempt to identify in the pretrial order any issue concerning the statute of limitations; the judge had told them, twice, that no such question

was open," noting that "[r]ules concerning timely presentation and forfeiture are designed to ensure that the parties present their arguments at the appropriate time." *Id.* The court held that requiring parties to raise issues in the pretrial order already rejected by the district court "sets a trap for the unwary without advancing the orderly resolution of litigation," and "would ensnare even wary litigants." *Id.*

The Seventh Circuit has since confirmed that *Calderon* is an exception to the rule that issues not raised in a pretrial order are forfeited, stating that "to preserve the possibility of appeal, the parties need not list an issue that was resolved before trial." *Nagy* v. *Riblet Prods. Corp.*, 79 F.3d 572, 575 (7th Cir. 1996) (Easterbrook, J.).

While the Seventh Circuit's opinion addresses the inclusion of affirmative defenses in a pretrial order generally, other courts of appeal have reached similar conclusions with respect to qualified immunity specifically. The First Circuit has held that a defendant's failure to include qualified immunity in a pretrial order did not waive the defense for purposes of the trial. In *Guzman-Rivera* v. *Rivera-Cruz*, the defendant state officials raised qualified immunity for the first time in their answer to an amended complaint filed three days before trial was scheduled to begin, and first moved for summary judgment on qualified immunity in their third summary judgment motion eight months later. 98 F.3d 664, 669 (1st Cir. 1996).

The First Circuit held that defendants' late assertion of the defense waived qualified immunity, but only "for the current stage of the litigation" *i.e.*,

pre-trial. The court held that "[b]ecause the defense of qualified immunity may be raised and appealed at multiple stages of the trial, it would be inappropriate to find waiver for all stages in the current case." *Id.* Accordingly, the decision "le[ft] defendants free to present the qualified immunity defense at trial, despite the fact that the defense is waived for pre-trial purposes." *Id.* Consistent with this approach, the First Circuit has also reviewed a qualified immunity claim that was raised for the first time in a motion for judgment notwithstanding the verdict. *O'Connor* v. *Huard*, 117 F.3d 12, 17 (1st Cir. 1997) (applying plain error standard of review).

The Fifth Circuit has similarly held that qualified immunity is not waived by the failure to list it in the pretrial order. *Spann* v. *Rainey*, 987 F.2d 1110 (5th Cir. 1993). As here, *Spann* involved a qualified immunity claim raised after the district court granted a new trial following a jury verdict. The plaintiff in *Spann* was a diabetic arrested after acting irrationally during an episode in his doctor's reception area. *Id.* at 1112 & n.3. In response to Spann's Section 1983 civil rights action, the defendant officers asserted qualified immunity in their answers to the complaint. *Id.* The officers did not move for dismissal on that ground before trial, nor did they list the defense in the pretrial order. *Id.* at 1112-13, 1114 n.6. Following a jury verdict for the officers, the district court granted a motion for a new trial with respect to one defendant, who then unsuccessfully moved to dismiss the case or for summary judgment based on qualified immunity. *Id.* at 1112-13.

On appeal, the plaintiff argued that the defendant waived qualified immunity by failing to list the defense in the pretrial order and by failing to seek dismissal prior to trial. *Id.* at 1113, 1114 n.6. The Fifth Circuit did not accept either argument. *Id.* The court recognized that "the interests at the heart of qualified immunity are best served when, unlike here, the defense is asserted at the earliest possible stage." *Id.* at 1114. But the court went on to hold that "[t]hose interests are still served, however, even if in a more limited fashion, by assertion of the defense at some later stage." *Id.* The court concluded that the defendant's "interests in the avoidance of a second trial and, ultimately in avoiding liability, would still be served by a successful assertion of the defense at this stage." *Id.*

The Tenth Circuit's refusal to review the denial of qualified immunity on appeal from final judgment also cannot be reconciled with several appellate decisions holding that qualified immunity is not waived if an official elects not to immediately appeal the denial of a motion to dismiss or a motion for summary judgment on qualified immunity grounds. While this Court's decisions provide that an interlocutory appeal is available, *see Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996), *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985), a number of lower courts have recognized that "the right not to pay damages and the right to avoid trial are distinct aspects of immunity, and the former may be raised on appeal at the end of the case even if defendants bypass their right to appeal under *Forsyth* before trial." *Apostol* v. *Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989); *see also Pierce* v. *Smith*, 117 F.3d 866, 871

n.4 (5th Cir. 1997) ("The failure to take an interlocutory appeal from the denial of a pretrial motion to dismiss or for summary judgment does not waive the defense of qualified immunity."); *Littlewind* v. *Rayl*, 33 F.3d 985, 986-87 (8th Cir. 1994) ("We acknowledge that defendants were not required to file an immediate interlocutory appeal from the . . . pretrial order denying their qualified immunity defense in order to preserve the qualified immunity issue on appeal."); *but see Kennedy* v. *City of Cleveland*, 797 F.2d 297, 304 (6th Cir. 1986) (appeal from denial of qualified immunity motion waived if not appealed within 30 days).

Finally, the Tenth Circuit's decision is in tension with courts of appeals that have reviewed qualified immunity on appeal even if not raised at trial. For example, the Eleventh Circuit reviewed a qualified immunity defense *de novo* where the defendant pled qualified immunity in the answer "but notably did not pursue the defense further by either a pretrial motion to dismiss or for summary judgment." *Alexander* v. *Fulton County, Ga.*, 207 F.3d 1303, 1320 & n. 10 (11th Cir. 2000). Similarly, the Ninth Circuit has reviewed a denial of qualified immunity raised for first time after verdict for plain error "in the interest of justice." *Kelly* v. *City of Oakland*, 198 F.3d 779, 784 (9th Cir. 1999).

The Tenth Circuit appears to stand alone in refusing to consider a qualified immunity defense on appeal solely on the grounds that it was not included in the pretrial order. App., *infra*, 16a-17a n.9. Its decision creates exactly the kind of trap, rejected by the Seventh Circuit, that "would ensnare even wary litigants" even though "[n]othing in the Rules of Civil

Procedure tells counsel that to preserve issues for appeal they must insert into the pretrial order contentions that have already been rejected by the judge." *Calderon,* 999 F.2d at 1108.

Moreover, by treating qualified immunity as waived *for all purposes* based on the failure to include it in the pretrial order, the opinion below is directly contrary to the First and Fifth Circuits' decisions in *Guzman-Rivera* and *Spann,* both of which recognize that the nature of a qualified immunity defense is such that it can be raised at any time. Unlike the Tenth Circuit, the decisions in those Circuits' cases are faithful to this Court's teaching that qualified immunity is a defense to liability as well as an immunity from suit. *See Mitchell* v. *Forsyth,* 472 U.S. 511, 526 (1985); *Gomez* v. *Toledo,* 446 U.S. 635, 639 (1980). As the Fifth Circuit explained in the *Spann* case, the interests that this Court has identified as behind qualified immunity--"distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"--are still served even if the defense does not avoid a trial but is asserted at some later stage. 987 F.2d at 1114, quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 816 (1982); *see also Guzman-Rivera,* 98 F.3d at 669 ("Because the defense of qualified immunity may be raised and appealed at multiple stages of the trial, it would be inappropriate to find waiver for all stages in the current case.").

This Court has repeatedly recognized that the availability of qualified immunity—and the opportunity for appellate review of any decision withholding such immunity—is vitally important if

government officials are to exercise their discretion in carrying out the responsibilities of government. *See, e.g., Mitchell*, 472 U.S. at 526-27. This is especially so for public servants, like petitioners, who have responsibilities for administering complex and costly government programs, and who often are sued personally for their agency's actions as a result of the State's own Eleventh Amendment immunity from suit. As the case law indicates, the issue of whether, when, and for what purposes a qualified immunity defense can be waived is important and recurring. In light of the important interests underlying the qualified immunity of government officials, the issue merits this Court's consideration and further guidance.

II. The Tenth Circuit's Opinion Deepens A Split Among The Courts Of Appeals On The Standard Of Review Of A District Court's Grant Of A Motion For A New Trial.

This Court has held that "[t]he trial judge in the federal system has . . . discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence." *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 540 (1958). "This discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." *Gasperini* v. *Ctr. for Humanities*, 518 U.S. 415, 433 (1996). Accordingly, the courts of appeals have generally reviewed a district court's decision on a motion for a new trial, to set aside the verdict, or for remittitur for abuse of discretion. *E.g., Stamathis* v.

Flying J, Inc., 389 F.3d 429, 439 (4th Cir. 2004) ("Because setting aside a verdict as excessive is within the discretion of the trial court, we review for abuse of discretion.").

Prior to 1996, some courts of appeals held the view that the Seventh Amendment's prohibition on reexamination of facts "tried by a jury" counseled a more stringent review than abuse of discretion when a district court grants a motion for a new trial. In the *Gasperini* case, however, the Court held that "appellate review [of district court excessiveness decisions] for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice." 518 U.S. at 435.

Following *Gasperini*, the courts generally have stated that abuse of discretion governs review of a decision to order a new trial. *Compare, e.g., Radwan* v. *Carteret Bd. of Educ.*, 62 F. App'x 34, 37 (3d Cir. 2003) (unpublished) ("[W]e will reverse an order for a new trial only where we conclude that the district court abused its discretion.") *with Lind* v. *Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960) (Appellate court must "exercise a closer degree of scrutiny" when the trial judge "grants a new trial on the ground that the verdict was against the weight of the evidence . . . in order to protect the litigants' right to jury trial."); *see also Medcom Holding Co.* v. *Baxter Travenol Lab.*, 106 F.3d 1388, 1397 & n.3 (7th Cir. 1997) ("abandon[ing] the practice," in light of *Gasperini*, of applying "abuse of discretion standard of review 'somewhat more exactingly' when the district court granted a motion for a new trial").

The Tenth Circuit here acknowledged the abuse of discretion standard approved in *Gasperini*, yet went on to apply "more stringent scrutiny" to the district court's decision to grant a new trial. App., *infra*, 15a-16a. The court of appeals' decision is in tension with *Gasperini* itself, and directly conflicts with several other circuits that have specifically applied abuse of discretion to the grant of a new trial. Still other courts of appeals, like the Tenth Circuit, continue to apply a more rigid approach.

A. Five Circuits Specifically Apply Abuse Of Discretion To Review New Trial Grants.

Five circuits have specifically stated that the abuse of discretion standard governs appellate review of a district court's *grant* of a new trial motion.

The Seventh Circuit has held that "We review the district court's grant of a motion for a new trial for abuse of discretion." *McClain* v. *Owens-Corning Fiberglas Corp.*, 139 F.3d 1124, 1126 (7th Cir. 1998). The Seventh Circuit formerly applied the "abuse of discretion standard of review 'somewhat more exactingly' when the district court granted a motion for a new trial because of *Seventh Amendment* considerations," but in light of this Court's "decision in *Gasperini* that an abuse of discretion standard of review does not violate the *Seventh Amendment*," it "abandon[ed] this practice as unnecessary." *Medcom Holding Co.* v. *Baxter Travenol Labs., Inc.*, 106 F.3d 1388, 1397 & n.3 (7th Cir. 1997) .

The Second Circuit has likewise held: "This court reviews the grant of a new trial on the ground

that the verdict was against the weight of the evidence for abuse of discretion. *Amorgianos* v. *Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 261 (2d Cir. 2002); *see also Farrior* v. *Waterford Bd. of Educ.*, 277 F.3d 633, 634 (2d Cir. 2002) ("A district court's grant of a new trial on the ground that the verdict was against the weight of the evidence is reviewed for abuse of discretion."); *Cross* v. *N.Y. City Transit Auth.*, 417 F.3d 241, 258 (2d Cir. 2005) ("We review a district court's ruling on a remittitur motion '*only* for abuse of discretion.'" (emphasis added)), quoting *Rangolan* v. *County of Nassau*, 370 F.3d 239, 245 (2d Cir. 2004) ("Where the district court has decided whether and/or to what extent the jury's verdict was excessive, its decision is reviewable only for abuse of discretion.").

The Fourth Circuit too has held that "[t]he decision *to grant or deny* a new trial is within the sound discretion of the district court, and we respect that determination absent an abuse of discretion." *Cline* v. *Wal-Mart Stores*, 144 F.3d 294, 301 (4th Cir. 1998) (emphasis added).

And the Fifth Circuit has stated that "[t]he district court's decision to *grant or deny* a Rule 59(a) motion will be reversed *only* for an abuse of discretion." *United States* v. *Flores*, 981 F.2d 231, 237 (5th Cir. 1993) (emphasis added). Even before *Gasperini*, the Eighth Circuit likewise stated, "the abuse of discretion standard has been applied in our circuit *only* to orders *granting* new trials." *Czajka* v. *Black*, 901 F.2d 1484, 1485 (8th Cir. 1990) (emphasis added).

B. The Tenth Circuit Is One Of Four That Apply A More Searching Inquiry.

Contrary to the holdings of five circuits, the Sixth, Tenth, Eleventh, and D.C. Circuits apply a closer degree of scrutiny to decisions that *grant* a new trial than to decisions that *deny* the request for a new trial.

Here, the Tenth Circuit stated that although it applies abuse of discretion when reviewing a district court's denial of a new trial, "when appellate review is of a district court's *grant* of a new trial, we subject that decision to more stringent scrutiny in order that the district court's judgment not be substituted for the jury's." App., *infra*, 15a-16a. "'This is particularly true when the motion is granted on the ground that the verdict is against the weight of the evidence.'" *Id.* at 16a, quoting *Hutchinson* v. *Stuckey*, 952 F.2d 1418, 1421 (D.C. Cir. 1992). While the court of appeals cited cases from the Sixth, Third, and D.C. Circuits for this proposition, all of the cases it cited were pre-*Gasperini*.

Nevertheless, the Sixth and D.C. Circuits continue to apply closer scrutiny to a district court's grant of a new trial. The Sixth Circuit holds that the appeals court has a duty "'to exercise a *closer degree of scrutiny*'" when a new trial is granted "on the basis that the verdict was against the weight of the evidence." *Denhof* v. *City of Grand Rapids*, 494 F.3d 534, 543 (6th Cir. 2007), quoting *Duncan* v. *Duncan*, 377 F.2d 49, 52 (6th Cir. 1967). "'Such a close scrutiny is required in order to protect the litigants' right to jury trial.'" *Id.*

The D.C. Circuit has adhered to its decision in *Hutchinson* v. *Stuckey* (cited by the Tenth Circuit here), that where "the trial court grants a motion for new trial, 'a more searching inquiry is required,' because of 'the concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact-finding function.'" 952 F.2d at 1420-21 (citations omitted). *See Langevine* v. *District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997).[4]

The Eleventh Circuit also applies more exacting scrutiny than abuse of discretion. In perhaps the most forthright discussion among the cases that apply greater scrutiny to new trial grants, the Eleventh Circuit stated:

> As for orders granting a motion for new trial, we have said that we generally review such orders for clear abuse of discretion. Although we have said that, we have also observed that we "accord less deference to a district court's grant of a new trial than the 'abuse of discretion' standard of review implies." To be honest about it, at least insofar as weight of the evidence is concerned: the label 'abuse of discretion' belies the standard of review that we actually apply to grants of motions for a new

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[4] In *Langevine*, the D.C. Circuit stated that the order granting a new trial at issue in that case "is reviewed for abuse of discretion," but nevertheless went on to recite the "more searching inquiry" language and reversed the grant. 105 F.3d at 1023.

> trial. We may conclude that the district court overreached its authority by granting a new trial if our review of the record reveals that the evidence did not preponderate heavily against the jury's verdict. The grant of a motion for new trial generally is more closely scrutinized than a denial, and the grant of new trial based on the weight of the evidence is more closely scrutinized than the grant of new trial on other grounds.

Butcher v. *United States*, 368 F.3d 1290, 1297 (11th Cir. 2004) (citations and footnote omitted). The Eleventh Circuit has also noted, "While we do not conduct pure *de novo* review in these circumstances, the review that we do conduct is not much different because we want 'to assure that the judge does not simply substitute his judgment for that of the jury.'" *Id.*

C. Under This Court's Decision In *Gasperini*, The Tenth Circuit Should Have Upheld The District Court's Grant Of A New Trial As Within Its Discretion.

Because the decision to grant or deny a new trial is within the district court's discretion, review of that decision should be based on whether the district court abused its discretion. *Gasperini*, 518 U.S. at 433. There is no reason to believe that a district court would be any more likely to abuse its discretion when it grants a new trial than when it denies a new trial. Accordingly, the standard of review should not depend on the result of the district court's decision.

In this case, the district court, which had the opportunity to hear all the testimony and evaluate the credibility of the witnesses at the first trial, did not abuse its discretion in granting a new trial. The court correctly noted that an individual defendant's liability in a Section 1983 action must be based on that individual's personal participation in the allegedly wrongful activity and held that the evidence against Mr. Fogarty and Ms. Fritz was either pure speculation or based on "little more than proof that the particular defendant was a supervisor of some activity at OHCA." App., *infra*, 101a. The Court of Appeals' "more stringent scrutiny" led it to cull out small items of circumstantial evidence that, in its view, might have supported the jury verdict, even as it agreed with the district court that the principal evidence in support of the alleged retaliation—the corporate plaintiffs' evidence that they were reimbursed less than other private providers—had the "air of fantasy" and would have required the jury "to make a series of outlandish assumptions that find little support in the record." *Id.* at 51a. Under the proper abuse of discretion standard of review, the district court's assessment of the totality of the evidence against Petitioners would have prevailed.

III. The Tenth Circuit Erred In Reinstating The Punitive Damages While Remitting Or Remanding Most Of The Compensatory Damages Award.

Certiorari is also warranted in this case because of the Tenth Circuit's decision to reinstate the entire $900,000 punitive damages award against

Petitioners despite having remitted nearly all of the compensatory award.

The punitive damages award will not be paid by insurance, nor will it be indemnified by the state. *See* Okla. Stat. tit. 51, § 162(D) ("The state or a political subdivision shall not, under any circumstances, be responsible to pay or indemnify any employee for any punitive or exemplary damages rendered against the employee."); *Magnum Foods, Inc.* v. *Continental Casualty Co.*, 36 F.3d 1491, 1497 (10th Cir. 1994) ("Oklahoma courts adhere to the view that public policy prohibits liability insurance coverage of punitive damages except where the party seeking the benefit of insurance coverage has been held liable for punitive damages solely due to conduct of another, under principles of vicarious liability."); *Dayton Hudson Corp.* v. *American Mut. Liability Ins. Co.*, 621 P.2d 1155, 1156 (Okla. 1980) ("[P]ublic policy is generally contravened by coverage of punitive damages.").

The court below erred by reinstating the first jury's punitive damages award even though that award was surely linked to it's $33 million compensatory damage award, which the court largely remitted or remanded. That reinstatement fails to take account of the fact that "'the basic purpose' of § 1983 damages is 'to *compensate persons for injuries* that are caused by the deprivation of constitutional rights.'" *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986), quoting *Carey* v. *Phiphus*, 435 U.S. 247, 254 (1978) (emphasis supplied). While punitive damages may be awarded in a Section 1983 case, "[t]he principle that exemplary damages must bear a 'reasonable

relationship' to compensatory damages has a long pedigree." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 580 (1996). Where, as here, the basis for the compensatory damages award is undermined or found to be invalid, the existence of a "reasonable relationship" between that award and the punitive damages award is called into serious question.

Here, almost all of the jury's compensatory damages award was remitted as shocking to the judicial conscience or remanded for lack of support in the record. *See* App., *infra*, 43a-47a, 51a-52a. The corporate plaintiffs' damages were based on the flawed evidence of Respondents' expert, which the court of appeals said was "not simply imprecise – rather, it had the air of fantasy," and would require a juror "to make a series of outlandish assumptions that find little support in the record." App., *infra*, 51a. The court found that the jury accepted this evidence, resulting in an award that was "speculative, remote, imaginary, or impossible of ascertainment." *Id.* at 52a.

The compensatory damages to the individual plaintiffs were largely remitted by the court of appeals for nominal damages or with an implied suggestion to reduce by two-thirds or more. *Id.* at 43a-47a. The court found these awards "are so excessive as to shock the judicial conscience." *Id.* at 44a.

The court's rejection of nearly the entire damages award calls into question the validity of the punitive damages award because it radically changes the "reasonable relationship" question articulated in *Gore*. The same flawed evidence that led the jury to a damages award shocking to the judicial conscience

an award that the court found "speculative" undoubtedly infected the jury's consideration of punitive damages. As an additional consideration in favor of certiorari, the Court should consider whether a punitive damages award against an individual state official sued personally in a Section 1983 case may be upheld where the underlying compensatory damages award has been substantially overturned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2008

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 05-6106, 05-6109, 05-6110, 05-6112, 05-6122, 05-6358, 05-6359, & 05-6361

ALFRED MILTON EVANS, an individual; SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC., a corporation; RUSTLING WINDS, INC., an Oklahoma corporation; MORNING STAR MENTAL HEALTH SERVICES, INC., an Oklahoma corporation; DIVERSIFIED FAMILY SERVICES, INC., an Oklahoma corporation; SERENITY SPRINGS MENTAL HEALTH SERVICES, L.L.C., an Oklahoma corporation; JCH, INC., an Oklahoma corporation; NEAL THRIFT, an individual; NANCY GRAVES-THRIFT, an individual; JOHN MAJORS, an individual; CYNTHIA MAJORS, an individual; CHARLES PARKHURST, an individual; MARY PARKHURST, an individual; LEROY WHEELER, an individual; and JOEL HOLCOMB, an individual,

Plaintiffs-Appellants/Cross-Appellees,

v.

MICHAEL FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority;

TERRIE FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority; and DANA BROWN, in her individual capacity, as well as in her official capacity as Legislative Liaison for the Oklahoma Health Care Authority; TENKILLER BEHAVIORAL SERVICES INC., an Oklahoma corporation; DAVETTA MCINTOSH, an individual,

Defendants-Appellees / Cross-Appellants.

ORDER AND JUDGMENT*

Filed, August 22, 2007

Before TACHA, Chief Circuit Judge, McWILLIAMS, Senior Circuit Judge, and LUCERO, Circuit Judge.

This case arises from a bare-knuckled political battle over state funding for outpatient behavioral and mental health services in Oklahoma between 1998 and 2002. It has resulted in a series of cases of unusual procedural complexity, as well as two jury verdicts. We conclude that the district court abused its discretion in granting a new trial following the

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

first verdict. Exercising jurisdiction under 28 U.S.C. § 1291, we REVERSE.

I

During the period at issue, plaintiffs[1] operated clinics, predominantly in rural areas of Oklahoma, providing services to adults and children with mental and behavioral disorders. Plaintiffs relied almost exclusively on Medicaid funding to cover the cost of providing these services, and their private clinics were among many publicly funded facilities that offered such services. Medicaid funding also flowed to state-affiliated community mental health centers ("CMHCs"), which are typically paid more than private providers for the same services.

Michael Fogarty, Terrie Fritz, and Dana Brown ("defendants") were senior officials of the Oklahoma Health Care Authority ("OHCA"), the agency charged with administering Medicaid funds, during the relevant period. Fogarty was hired as the Oklahoma state Medicaid director in 1995 and was promoted to Chief Executive Officer of OHCA in September 1999. Fritz worked under Fogarty as OHCA's Director of Behavioral Health Services. Brown also worked under Fogarty as OHCA's legislative liaison in the state Capitol.

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[1] Individual plaintiffs include: Alfred Milton Evans, John Majors, Cynthia Majors, Joel Holcomb, Neal Thrift, Nancy Graves-Thrift, Leroy Wheeler, Charles Parkhurst, and Mary Parkhurst. Corporate plaintiffs include: Southeastern Oklahoma Family Services, Inc. ("SOFS"), Morning Star Mental Health Services, Inc. ("Morning Star"), JCH, Inc., Rustling Winds, Inc., Serenity Springs Mental Health Services, L.L.C., and Diversified Family Services, Inc. ("DFS").

By the late 1990s, Fogarty, Fritz, and other officials at OHCA faced substantial pressure to reduce Medicaid costs. At the same time, private providers of behavioral and mental health services were competing with CMHCs for the limited budget available for such services. Private providers had expanded rapidly, and by the year 2000 numbered some 180, located at 330 sites. Medicaid funds paid to these private providers grew from $3.1 million in 1994 to $22.1 million in 1997. Fogarty and other OHCA officials viewed the rise in overall expenditures with alarm.[2] They also grew concerned about the relatively limited oversight of private providers, which they believed created an opportunity for fraud, mismanagement, and the provision of substandard services. Accordingly, OHCA took a number of steps to limit the growth in Medicaid reimbursements to private providers and to engage in more aggressive oversight of these private facilities.

A number of private providers took umbrage with OHCA's policies during this period and came to believe that Fogarty and others wanted to drive private providers out of business. As their dissatisfaction increased, a group of private providers banded together in late 1998 to form the Oklahoma Private Mental Health Providers Association ("Association"). All individual plaintiffs were members of the Association, which lobbied

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[2] OHCA overspent the behavioral health budget line item by more than one hundred percent between 1996 and 1998.

extensively in the state legislature, the Governor's office, and elsewhere in support of its interests.

Conflict between the Association and the defendants first came to a head in 1998, when the Association successfully persuaded the Governor not to sign a set of "emergency" rules proposed by OHCA. Those rules would have required, among other things, all therapists to obtain a master's degree within six months of adoption of the rules. Defendants supported this rule as a way to ensure quality and consistency of services, but the Association persuaded the Governor that the rules would put most private providers out of business. A second conflict arose when, in July 1999, OHCA imposed across-the-board cuts in "units of service" for mental health services by 30 percent for adults and by 5 percent for children.[3] Faced with a steep

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[3] Some knowledge of OHCA's reimbursement procedures is a predicate to understanding plaintiffs' claims. Private providers and CMHCs were reimbursed on the basis of "units" of services provided to individual patients. Beginning in 1996, and in response to rising expenditures, each private provider was required to submit a treatment plan to the Oklahoma Foundation for Medical Quality ("OFMQ"), an independent, non-profit foundation; CMHCs were not subject to preapproval of treatment plans. OFMQ's primary responsibility is to vet individual treatment plans under a set of objective "medical necessity" criteria. Plans were approved on the basis of an authorized number of units, each of which represented a certain amount of a specific type of therapy or rehabilitation. Units were not priced uniformly across therapies – for example, the reimbursement rate for a unit of individual counseling was $27.23 during the relevant period as against $5.63 for a unit of group rehabilitation. Total reimbursement for each patient depended on the number and type of units OFMQ approved (and on whether the provider in fact billed all approved units for each patient).

drop in revenue as a result of the cuts, the Association persuaded the legislature to pass a $500,000 supplemental appropriation in February 2000 and then a further appropriation of $1.1 million in May 2000. When combined with federal matching funds, the supplemental appropriation resulted in a $5.2 million influx, intended to restore funding to prior levels. A third conflict arose over proposed legislation, known as House Bill 1075, which would have equalized funding and oversight between CMHCs and private providers. The Association unsuccessfully supported the bill as a means of "leveling the playing field" between all providers of behavioral and mental services; defendants opposed it.

On February 6, 2001, Evans, SOFS, and certain SOFS patients filed suit under 42 U.S.C. § 1983 against the defendants, Lynn Mitchell, OHCA State Medicaid Director, and members of the OHCA Board in their official capacities. That suit alleged unlawful termination of SOFS' Medicaid contract, unlawful denial of requests for reimbursement, and First Amendment retaliation. Those plaintiffs sought injunctive relief, compensatory damages, and certification of a class action.[4] On April 10, 2001, Rustling Winds and the other plaintiffs filed a similar § 1983 action against the defendants, Mitchell, members of the OHCA Board in their

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[4] The court granted injunctive relief in that case, preventing the termination of SOFS' Medicaid contract. We affirmed. See *Evans* v. *Fogarty*, 44 F. App'x 924 (10th Cir. 2002).

official capacities, and OFMQ.[5] The district court consolidated those actions on May 15, 2002. Plaintiffs filed a third amended complaint on June 25, 2002.

All plaintiffs went to trial on April 14, 2003, solely on their § 1983 First Amendment retaliation claim.[6] Over the course of the trial, plaintiffs presented evidence in support of several alleged patterns of retaliation, each of which, they argued, sufficed to prove their claim against all three defendants. Plaintiffs first testified that defendants, particularly Fogarty and Brown, spoke to plaintiffs on numerous occasions in rude, threatening, and demeaning terms. Second, they stated that defendants singled out some of the plaintiffs for "retaliatory" audits by the Surveillance Utilization Review Subsystem ("SURS") unit within OHCA, which was responsible for auditing Medicaid recipients throughout the state. Third, plaintiffs alleged that defendants directed OFMQ to reduce their reimbursement rates by rejecting requests for higher value units, and further directed OFMQ to impose greater administrative burdens on them. Fourth, plaintiffs claimed that defendants prevented

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[5] Several parties in the *Rustling Winds* litigation are no longer part of this case. Various original plaintiffs have dropped out and plaintiffs' claims against OFMQ were later dismissed. Mitchell, and a subsequently added defendant, Jana Webb, were granted judgment as a matter of law ("JMOL") at trial. Neither of those orders is before us on appeal.

[6] Pre-consolidation, the Evans and Rustling Winds district courts separately granted defendants' motion to dismiss as to all claims other than plaintiffs' First Amendment retaliation claim.

them from receiving their share of the supplemental appropriations approved by the Oklahoma legislature in 2000. They provided evidence showing that non-politically active providers received, on average, higher reimbursement rates per unit of service.

The jury returned a verdict in favor of all plaintiffs and against all defendants in the amount of $33,095,000, and returned a subsequent punitive damages verdict in the amount of $1,350,000. Of the compensatory damages, $24 million was awarded to the various corporate plaintiffs, and the remainder was awarded to the various individual plaintiffs. All compensatory damages were allocated between defendants according to the same ratio – 60 percent from Fogarty, 30 percent from Fritz, and 10 percent from Brown. Punitive damages were awarded in the amount of $50,000 for each individual plaintiff against each defendant. Following the verdict, the court considered defendants' motions for JMOL under Fed. R. Civ. P. 50(b).[7] On July 9, 2003, it entered an order denying JMOL to Fogarty and Fritz as to all plaintiffs, and granting JMOL to Brown, but only as to the corporate plaintiffs and Holcomb. In the same order, the court denied plaintiffs' request for injunctive relief against members of the OHCA

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[7] Defendants moved for JMOL under Rule 50(a) at the close of plaintiffs' case. Although the district court denied those motions as to Fritz, Fogarty, and Brown at that time, there is some ambiguity in the record as to whether it allowed supplemental briefing on those motions post-trial, or considered the post-verdict motions solely under Rule 50(b).

Board of Directors. That denial is not before us on appeal.

Defendants then filed renewed motions for JMOL and, in the alternative, a new trial or remittitur. On August 25, 2003, the district court granted defendants' motion for a new trial, vacating judgment in the first trial [hereinafter "new trial order"]. The new trial order specifies two primary justifications for vacating the judgment: (1) "[T]he evidence tending to show retaliation against plaintiffs by any of the defendants was extraordinarily thin"; and (2) There was no proper evidentiary basis for either the amount or allocation of the jury's damages awards. *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 3 (W.D. Okla. Aug. 25, 2003). With regard to the first ground, the court stated:

> [M]uch of the evidence offered to establish retaliatory activity by defendants Fogarty, Fritz and Brown bordered on pure speculation and, in some instances, was based on little more than proof that the particular defendant was a supervisor of some activity at OHCA. . . . While the evidence here was sufficient to raise a jury question as to the potential liability of these defendants, that evidence was far from compelling.

Id. With regard to the second ground, the court stated: "[E]ach plaintiff had the burden of establishing not only that plaintiff's entitlement to relief but also the amount of damages that plaintiff had suffered: Here, plaintiffs made no effort to

quantify the economic losses of each corporate plaintiff." *Id.* at 4. It further stated that with respect to the corporate plaintiffs, "[t]he appropriate measure of damages in this case was the lost profits – not lost gross revenues – of the plaintiffs due to defendants' alleged retaliatory actions. . . . Plaintiffs' 'disparity' evidence, to the extent that it proved anything, showed the loss in gross revenues the plaintiffs arguably had from the alleged differential treatment." *Id.* at 5.

A second trial was held from September 15-23, 2004. Although the evidence offered by the parties at the second trial varied somewhat from that offered at the first, plaintiffs alleged the same patterns of retaliatory behavior. Defendants filed a motion for summary judgment based on qualified immunity in advance of the second trial, and reasserted that defense in subsequent motions for JMOL.[8] The district court denied that motion in an order dated December 3, 2003, stating:

> This case has already gone to trial once. The pretrial order entered in the case did not preserve or assert the defense of qualified immunity. While a second trial need not necessarily involve the same witnesses and proof, the Court concludes it is inappropriate . . . to

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[8] Defendants failed to raise an affirmative defense of qualified immunity in the Final Pretrial Report before the first trial, or their motions for JMOL before or after the first trial. Brown alone raised the defense of qualified immunity in her post-trial motion for JMOL.

> permit defendants to raise new and different legal issues or defenses not at issue in the first trial.

Evans v. *Fogarty*, No. CIV-01-0252-HE (W.D. Okla. Dec. 3, 2003). Defendants appealed from this order, and we dismissed their appeal for lack of jurisdiction. *See Evans* v. *Fogarty*, 123 F. App'x 863 (10th Cir. 2005). Additionally, defendants unsuccessfully objected, in advance of the second trial, to the testimony of plaintiffs' expert witness Dale McDaniel. This was in contrast to the first trial, at which McDaniel testified largely without objection.

At the close of the second trial, the jury found for all plaintiffs against Fogarty in the amount of $1,020,000 for the individual plaintiffs and $14,295,000 for the corporate plaintiffs. As to Fritz, the jury found for her against all plaintiffs except Holcomb and his company, JCH, returning verdicts in their favor for $250,000 and $325,000 respectively. As to Brown, the jury found against her as to only two plaintiffs, Neal and Nancy Thrift, returning verdicts for them of $25,000 each. After a second bifurcated punitive damages proceeding, the jury awarded a total of $300,000 in punitive damages to the corporate providers against Fogarty, $7500 to JCH against Fritz, and $500 to each of the Thrifts against Brown.

Following the verdict, defendants renewed their motions for JMOL, which the district court granted in part and denied in part on February 23, 2005. *Evans* v. *Fogarty*, No. CIV-01-0252-HE (W.D. Okla. Feb. 23, 2005). In its order, the court reaffirmed many of the doubts it expressed in the new trial order and its order granting partial JMOL following

the first trial. At heart, the court found plaintiffs' evidence to be almost entirely conjectural as to causation:

> The Court concludes that merely showing that a defendant is the head of an agency or an agency program area, committed unrelated "bad acts," and had serious disputes or disagreements with a plaintiff, combined with evidence that the plaintiff was treated unfavorably by the agency or experienced some sort of undesirable agency action, is not enough, in and of itself, to support an inference that the defendant caused whatever harm the plaintiff objects to.

Id. at 8. More specifically, the court determined that the plaintiffs' most fully-developed theory of retaliation, that defendants directed OFMQ to discriminate against them by rejecting high-rate units, found no support in the record: "There was not . . . evidence from which a jury could have reasonably concluded that these circumstances were due to Fogarty trying to single out and punish the plaintiffs – these facts and circumstances applied to all private providers." *Id.* at 10. The order identifies at least four discrete breaks in the causal chain with respect to the reimbursement disparity evidence: (1) a lack of evidence suggesting Fogarty, Fritz, or Brown had control over OFMQ approvals; (2) a lack of comparative data indicating the alleged disparity occurred after plaintiffs' political activities began; (3) wide variation in the average monthly reimbursement rate between plaintiffs and other

providers (and also among plaintiff providers); and (4) a lack of evidence that plaintiffs provided similar services to other private providers or CMHCs.

On these bases, the court granted JMOL to Fogarty with respect to all the corporate providers and two individual plaintiffs – Mary Parkhurst and Holcomb. Recognizing that § 1983 liability does not extend to defamation, the court nonetheless upheld the jury's verdict against Fogarty in favor of the other individual plaintiffs on the basis of a "defamation plus threat" theory of liability. It held that "defamatory language accompanied by some 'threat, coercion, or intimidation intimating that punishment, sanction or adverse regulatory action will imminently follow,' may support a First Amendment retaliation claim." *Id.* at 12 (quoting *Suarez Corp. Indus.* v. *McGraw*, 202 F.3d 676, 687 (4th Cir. 2000). "Here, although a close question, the Court concludes there was evidence from which the jury could reasonably have found that Fogarty defamed and at least implicitly threatened those plaintiffs present in the meetings [at the state Capitol]." *Id.* at 13. It granted JMOL to Fritz as to all plaintiffs, finding that the same causal breaks with respect to the disparity evidence and control of OFMQ that applied to Fogarty extended to Fritz. *Id.* at 31-33. Finally, it denied JMOL to Brown based on the same "defamation plus threat" theory of liability it relied on to uphold some of the individual damages awards against Fogarty. "[T]he jury could have concluded that Brown made defamatory comments about the Thrifts to legislators or others, under circumstances implying that some punishment,

sanction or adverse regulatory action would imminently follow." *Id.* at 35.

On October 4, 2005, the district court entered an order granting plaintiffs a reduced attorneys' fee award pursuant to 42 U.S.C. § 1988(b). Fees and costs were awarded to the plaintiffs in the amount of $356,749.40 against Fogarty and $60,500 against Brown.

Plaintiffs now appeal from the district court's February 23, 2005 order granting in part and denying in part defendants' motions for JMOL. They seek reinstatement of the first jury verdict in full or, in the alternative, reinstatement of the second jury verdict in full. Defendants Fogarty and Brown cross-appeal from the same order, seeking JMOL as to all plaintiffs. Plaintiffs also appeal from the district court's October 4, 2005 order granting a reduced fee award. In their fee appeal, they seek reimbursement for all fees and costs associated with this litigation. Defendants cross-appeal, arguing that the fee award should be reduced further, or eliminated entirely. We have consolidated the merits appeals (docket numbers 05-6106, 05-6109, 05-6110, 05-6112, 05-6122, and 05-6130) and fee appeals (docket numbers 05-6358, 05-6359, and 05-6361) for purposes of disposition.

II

Plaintiffs appeal from the district court's grant of partial JMOL following the second trial, which we review de novo, viewing all evidence in the light most favorable to the plaintiffs. *Herrera* v. Lufkin Indus., Inc., 474 F.3d 675, 685 (10th Cir. 2007). Under Fed. R. Civ. P. 50 the district court may grant JMOL if "a

reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Defendants Fogarty and Brown cross-appeal from the same order, arguing that JMOL should be granted as to all plaintiffs. "We review de novo a district court's denial of a motion for judgment as a matter of law." *Marshall* v. *Columbia Lea Reg'l Hosp.*, 474 F.3d 733, 738 (10th Cir. 2007) (citation omitted). "In order to reverse the trial court's decision on a motion for directed verdict, we must find the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." *Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1554 (10th Cir. 1991) (quotation and alteration omitted).

However, the unusual procedural posture of this case requires that we first assess plaintiffs' argument that the district court abused its discretion in granting defendants a new trial under Fed. R. Civ. P. 59. Thus far, plaintiffs have not been heard on this argument, as an order granting a new trial under Rule 59 is interlocutory, and thus is not a final decision from which an appeal may be taken under 28 U.S.C. § 1291. *See Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34 (1980). We review a trial judge's decision on a motion under Rule 59 for abuse of discretion. *See Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 433-35 (1996) (holding appellate review for abuse of discretion does not violate party's Seventh Amendment right to a trial by jury); *Frank* v. *Bloom*, 634 F.2d 1245, 1254-55 (10th Cir. 1980). Yet when appellate review is of a district court's grant of a new trial, we subject that decision to more stringent scrutiny in order that the district court's

judgment not be substituted for the jury's. *See Holmes* v. *City of Massillon*, 78 F.3d 1041, 1047 (6th Cir. 1996); *Hutchinson* v. *Stuckey*, 952 F.2d 1418, 1420-21 (D.C. Cir. 1992); *Lind* v. *Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960). "This is particularly true when the motion is granted on the ground that the verdict is against the weight of the evidence." *Hutchinson*, 952 F.2d at 1421. In those instances, "[s]uch a close scrutiny is required in order to protect the litigants' right to jury trial." *Id.* (quotation omitted).

III

Central to the district court's decision to grant a new trial was its view that "the evidence tending to show retaliation against the plaintiffs by any of the defendants was extraordinarily thin." *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 3 (W.D. Okla. Aug. 25, 2003). Accordingly, our review of the new trial order necessitates that we consider the sufficiency of plaintiffs' evidence at the first trial as to each defendant.

Plaintiffs brought suit against defendants under § 1983, alleging they suffered retaliation related to their exercise of First Amendment rights. "Although retaliation is not expressly discussed in the First Amendment, it may be actionable inasmuch as governmental retaliation tends to chill citizens' exercise of their constitutional rights." *Perez* v. *Ellington*, 421 F.3d 1128, 1131 (10th Cir. 2005) (citation omitted).[9] Outside the public employment

[9] Government officials sued for First Amendment retaliation typically assert the affirmative defense of qualified immunity, (...continued)

context, plaintiffs must prove the following elements to establish a retaliation claim:

> (1) that the plaintiff was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would

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in which case plaintiffs must also prove that "the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985); *see also Perez*, 421 F.3d at 1131. In this case, defendants failed to properly raise a qualified immunity defense in advance of the first trial. Preconsolidation, defendants moved under Fed. R. Civ. P. 12(b)(6) to dismiss both the Rustling Winds and Evans lawsuits, raising qualified immunity in those motions. Those motions were denied, and defendants then failed to assert qualified immunity in their motions for summary judgment, the pretrial order, or in their oral motions for JMOL at the close of the plaintiffs' case. Under these circumstances, we deem the defense waived. "[C]laims, issues, defenses, or theories of damages not included in the pretrial order are waived even if they appeared in the [pleadings]." *Wilson* v. *Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002); *cf. Maestas* v. *Lujan*, 351 F.3d 1001, 1010 (10th Cir. 2003) (holding defense not waived when defendant "raised qualified immunity as an affirmative defense in his Answer, referenced the defense in the Pretrial Order, and gave testimony on the matter at trial"). Although the defense of qualified immunity provides public officials important protection from baseless and harassing lawsuits, it is not a parachute to be deployed only when the plane has run out of fuel. Defendants must diligently raise the defense during pretrial proceedings and ensure it is included in the pretrial order. "To find otherwise is to invite strategic use of the defense by defendants who stand to benefit from delay." *Guzman-Rivera* v. *Rivera-Cruz*, 98 F.3d 664, 668 (1st Cir. 1996). Because we reinstate portions of the first jury verdict, we need not address defendants' argument that the district court abused its discretion in denying their request to assert qualified immunity at the second trial.

> chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct.

Worrell v. *Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000) (quotation and citation omitted).[10]

Parties do not dispute that plaintiffs engaged in protected First Amendment activity. Our review of the evidence from the first trial is thus limited to whether there was evidence of (1) "an injury that would chill a person of ordinary firmness from

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[10] We would normally evaluate plaintiffs' retaliation claim under the *Pickering/Connick* balancing test, which is applicable to parties who have a contractual relationship with the government. *See Bd. of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 673-78 (1996). In assessing whether a public employer has impermissibly infringed on an employee's speech rights, we apply the following test: "(1) whether the speech touches on a matter of public concern, (2) whether the employee's interest in commenting on matters of public concern outweighs the interest of the state in promoting the efficiency of the public service it performs through its employees, and (3) whether the protected speech was a substantial or motivating factor behind the adverse employment decision . . . . If these three factors are met, (4) the burden shifts to the employer to establish that it would have reached the same decision in the absence of the protected conduct." *Burns* v. *Bd. of County Comm'rs*, 330 F.3d 1275, 1286 n.7 (10th Cir. 2003). We applied this test when considering an earlier appeal from some of the parties in this case. *See Evans* v. *Fogarty*, 44 F. App'x 924, 929 (10th Cir. 2002). However, because the juries at both trials were instructed (albeit impermissibly, with the parties' consent) on the elements required to prove a First Amendment retaliation claim outside the public employment context, we apply those elements in this case.

continuing to engage in [protected] activity," (2) whether defendants caused that injury, and (3) whether defendants' actions were motivated by plaintiffs' protected activity. Worrell, 219 F.3d at 1212. As to the third issue, retaliatory motive, the district court found there was ample evidence of retaliatory motive in its order of July 9, 2003, and did not revisit this point in the new trial order. *See Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 5 (W.D. Okla. July 9, 2003) ("The Court has little difficulty in concluding there was sufficient evidence to create a jury question as to retaliatory motive."). Although defendants challenge this holding, we agree that there was sufficient evidence in the record for a jury to find retaliatory motive on the part of all three defendants. With respect to the causation and injury elements, we must examine the distinct patterns of retaliatory activity alleged by the plaintiffs to determine whether plaintiffs offered evidence as to any one pattern sufficient for a reasonable juror to find in their favor.

As we wade through the evidence presented at the first trial, we reemphasize the Seventh Amendment protections that underpin our inquiry, which provide that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. "Thus, under the Seventh Amendment, the court may not substitute its judgment of the facts for that of the jury; it may only grant a new trial if it concludes that the jury's verdict was so against the weight of the evidence as to be unsupportable." *Skinner* v. *Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988). It is also

worthy of mention that plaintiffs carried a burden to establish the personal participation of each defendant in the alleged retaliation; section 1983 liability may not be predicated on a respondeat superior theory. *See Butler* v. *City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993) ("A supervisor is not liable under 1983 unless an affirmative link exists between the constitutional deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise.") (quotation omitted).

A

Of the several patterns of retaliatory behavior alleged by plaintiffs at the first trial, the most thoroughly developed (and heavily contested) was their allegation that defendants directed OFMQ to approve fewer and lower value units for reimbursement, and to increase costly administrative burdens. In support of this allegation, plaintiffs offered their own testimony, the testimony of several third-party witnesses, and a set of data representing 25 months of reimbursement approvals for all private providers and CMHCs across the state. That data was compiled and analyzed by Roger Dale McDaniel, a certified public accountant who testified as an expert witness at the first trial. McDaniel analyzed monthly reimbursement data provided by Unisys Corporation, OFMQ's fiscal agent, for the months July 1999 through January 2002.[11]

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[11] Data from July through December 2000, and February 2001 was unavailable and was not provided.

For those months included in the Unisys reports, the data shows all units approved for each provider funded through OFMQ. McDaniel testified that, on average, the plaintiff providers (and some providers initially named as plaintiffs but later dismissed) were reimbursed at a lower rate per unit of service than CMHCs and non-plaintiff providers. Across this 25-month period, plaintiff providers were reimbursed at an average rate of $8.85 per unit, other private providers were reimbursed at an average rate of $18.13 per unit, and CMHCs were reimbursed at an average rate of $13.02 per unit (adjusted to $16.93 considering the 30 percent additional reimbursement provided to CMHCs). This disparity in average, across-the-board reimbursement rates was introduced as evidence of retaliatory injury and also as damages evidence with respect to the corporate plaintiffs.

Defendants did not object to McDaniel's qualifications to offer expert testimony on the Unisys data, but did challenge his methodology and conclusions on cross-examination. McDaniel admitted that his calculations represented nothing more than a simple average, not a mean or mode, and that he was unfamiliar with statistical methodologies. He also admitted that the Unisys data included only those units for which each provider was approved, and showed nothing about the quantity or type of units requested, or whether any individual provider even billed those units for which it was approved. He further admitted that, on average, plaintiff providers billed substantially more per client ($595.01) during that period than either

the CMHCs ($393.17)[12] or other private providers ($384.59).

Defendants moved for JMOL at the close of the plaintiffs' case, but did not raise specific objections to the disparity evidence at that time. As to Fritz, defendants stated:

> The testimony over and over and over again by various of the plaintiffs was that every time there was a budget problem at the Health Care Authority that such things as units were reduced or reimbursement rates were cut. But that applied to all private providers across the board. The unit cuts applied to CMHCs and private providers across the board. So what they have shown is that there was a budgetary motive and not a retaliatory motive on behalf of any of the plaintiffs [sic] in this case.

As to Fogarty and Brown, defendants did not mention the disparity evidence. In their motion for JMOL following the verdict, defendants focused on plaintiffs' failure to prove causation – *i.e.*, lack of evidence to prove Fritz or Fogarty exerted any control over OFMQ approvals – but said little about the validity of the disparity evidence as proof of retaliatory injury. In their renewed motion for JMOL or, alternatively, a new trial, defendants discussed the disparity evidence with respect to lost

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[12] This figure does not include the premium paid CMHCs to cover administrative costs.

profit damages, but only briefly touched on whether the disparity evidence could go toward retaliatory injury.

Nonetheless, in its July 9, 2003 order denying JMOL in part, the district court addressed several weaknesses of the disparity evidence in substantially greater detail than found in the defendants' motions for JMOL. It then explicitly referenced that discussion[13] in the new trial order, finding that the disparity evidence was insufficient to support a First Amendment retaliation claim as to any of the defendants. The court concluded that the evidence tending to show liability was "extraordinarily thin." *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 3 (W.D. Okla. Aug. 25, 2003). With respect to damages, the court found that "[t]he jury's formulaic allocation of damages between each of the defendants was also troublesome." *Id.* at 5. It determined that the corporate plaintiffs' damages awards were unsupported by the evidence, because they were based on a measure of lost revenues as opposed to lost profits. Individual plaintiffs'

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[13] The concerns addressed in the July 9, 2003 order include: (1) variance in reimbursement rates depending on the service provided, (2) lack of evidence showing plaintiff providers requested the same units as other providers, (3) lack of evidence as to uniformity of patient populations, (4) lack of evidence that approved units were in fact used/billed, (5) lack of "comparable statistical evidence regarding the relative reimbursement rates for the period prior to plaintiffs' political activities," and (6) evidence that disparities in reimbursement rates were of concern to plaintiffs even before 1999. *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 7 (W.D. Okla. July 9, 2003)

damages awards, which ranged from $295,000 to $1.5 million, were deemed excessive.

Although, as discussed *infra*, we share the district court's concerns about the corporate damages awarded at the first trial, we hold that it abused its discretion in granting a new trial. Taken in the context of all other evidence produced at trial, a reasonable juror could have found both retaliatory injury and causation. In its discussion of this evidence in the July 9, 2003 and new trial orders, the district court improperly intruded on the jury's primary role as factfinder and substituted its own judgment for that of the jury.

Our review of the evidence admitted at the first trial satisfies us that a reasonable juror could have found Fogarty and Fritz caused OFMQ to approve fewer and/or lower value units. Recognizing that "[i]ndividual liability under § 1983 must be based on personal involvement in the alleged constitutional violation," *Foote* v. *Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997) (citation omitted), there was sufficient evidence of Fritz and Fogarty's personal control over OFMQ to establish causation.

Fogarty testified via deposition that "we directly control [OFMQ] as a contractor" and "we write the terms of the contract and they agree to it." Charles Parkhurst, owner of DFS, testified that he spoke with Fogarty regarding certain units that Parkhurst felt were unfairly denied by OFMQ. According to Parkhurst, Fogarty agreed that the units should be restored, and that he would personally resolve the issue with a phone call to OFMQ. When asked whether Fogarty indicated that "with a simple phone call to OFMQ he could control your units," Parkhurst

replied, "Yes. That's what he told me." In fact, the contract in place between OHCA and OFMQ during this period provides for relatively close supervision of the OFMQ approval process by OHCA:

> The parties agree to discuss at a minimum of one weekly meeting any problems or concerns relating to [prior authorization] services.
>
> OFMQ agrees to provide a half time data analyst to assist the OHCA and the OFMQ prior authorization program in analyzing and studying utilization patterns of providers and recipients of outpatient behavioral health services.

By contrast, there is no provision in the contract for OFMQ's independence with regard to prior approval of reimbursement plans.

Fritz testified that she spoke with OFMQ staff regularly, and that when an individual provider raised a concern, she would occasionally call OFMQ to discuss what happened in that particular instance. OHCA Finance Director Deborah Ogles testified that Fritz was the "go-between" between OFMQ and senior executives at OHCA. OFMQ's Outpatient Behavioral Health Manager, Kirk Nicholson, testified that Fritz was his principle contact within OHCA, and that he touched base with her once per week. John Majors testified that he witnessed Fritz kick an OFMQ employee under the table during a meeting to indicate that a provider's question was best left to her.

Moreover, there was evidence suggesting that Fritz, and to a lesser extent Fogarty, had an

exquisite understanding of the relationship between the unit mix approved by OFMQ and overall outlays for behavioral and mental health services. For example, in an April 7, 1999 letter from Fritz to Sean Black discussing the potential cost impact of House Bill 1075, Fritz wrote:

> The assumption is that if the providers are able to use their bachelor trained employees to provide the more expensive counseling services instead of the lesser reimbursed rehab services there will be a significant tendency to do so. . . . If HB1075 were enacted the OHCA could anticipate very little use of the Individual Rehab treatment and continuing high use of the counseling units.

In a memo laying out what plaintiffs refer to as the "four point plan," Fritz describes OFMQ's role as "slow[ing] down" the growth of private provider services, and states that downward adjustment of rates was intended to "eliminate providers and services." By crediting these statements, a reasonable juror could surely draw the inference that Fritz and Fogarty exercised tight supervisory control over OFMQ and closely tracked private provider reimbursements.

Coupled with other evidence adduced at trial, jurors could also reasonably rely on the disparity evidence as proof of retaliatory injury. Plaintiff providers testified that they serviced the same population of patients as CMHCs and other private providers. Charles Parkhurst testified to fairly regular movement of patients back and forth

between DFS and a nearby CMHC. Several third-party witnesses corroborated that testimony. Linda Coffman, a licensed professional counselor at SOFS, testified that she could discern no difference between the patient population she serviced at her prior employer, a local CMHC, and that serviced by SOFS. Michael Elder, an attorney and one-time consultant to OHCA, testified that the services provided by CMHCs and private providers were "all the same." Nicholson testified that "[t]he same type of services as far as what they can provide are available between the two different – the privates and public facilities."

Although plaintiffs did not produce pre-1999 data, and thus could not show that the reimbursement disparity widened after they formed the Association, jurors could have relied on plaintiffs' testimony that the number and type of units approved changed after they began lobbying. Mary Parkhurst testified that she noticed a change in OFMQ treatment approvals at DFS in late 1999 through early 2000. Evans testified that after the Association began lobbying at the Capitol, "OFMQ got a little tougher to deal with." John Majors testified that in the Spring of 1999, "when we began to really speak out and ask for accountability OFMQ began to crack down and adjust. And almost like clockwork, when there would be a big issue at the capitol . . . my therapists would say sounds like you all spoke out today, because we're getting rejections, lowering units, major adjustments to our treatment plans." Neal Thrift testified that soon after the Association began lobbying, "we [were] not given as many units for the counseling services." Charles

Parkhurst testified that in 2000, "[w]e started getting a lot of modifications downward. We started getting a lot of requests for information. We got more technical denials. It turned into a nightmare."

Furthermore, there was at least some evidence that OHCA increased administrative burdens on plaintiff providers during this period. Holcomb testified that soon after joining the Association he noticed a delay in prior approvals. He also testified that during the process of getting Commission on Accreditation of Rehabilitation Facilities ("CARF") accreditation for JCH, one of the auditors spoke with someone at OHCA. Immediately thereafter, the auditors at his facility identified new problems. He further testified to receiving a call from Fritz telling him that he had not been accredited, before he himself had been notified of that fact by CARF.

Jurors could also have drawn the rational inference that plaintiff providers had an incentive to request higher value units, and did in fact request such units. William Schmid, a clinical psychologist, testified that the private providers worked off of a fixed cost base, and thus had a strong incentive to keep their clinicians providing therapy, and, ideally, higher value units of service. "[Y]ou really can't make up a loss on volume. I've tried; it doesn't work."

None of this is to refute the validity of the district court's concerns with respect to the admittedly imperfect disparity evidence derived from the Unisys data and testified to by McDaniel. Viewing the trial record as whole, a reasonable juror could conclude that Fogarty and Fritz moved aggressively in response to a severe budget crisis,

but that all policy changes designed to reign in costs applied to private providers across the board, and that they did not have the means to target the plaintiff providers even if they wished to. Yet a reasonable juror could also come to the opposite conclusion – that Fogarty and Fritz were persistently hostile to the plaintiff providers, whom they viewed as damaging to OHCA's interests, and used their authority to single out plaintiff providers for discriminatory treatment. Accordingly, the district court abused its discretion in taking that determination away from the jury.[14]

B

Plaintiffs argued that in addition to directing OFMQ to scale back on reimbursements to plaintiff providers, defendants used their authority to increase the number and intrusiveness of OHCA

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[14] In many ways, comparing this case to our decision in *Butcher* v. *City of McAlester*, 956 F.2d 973 (10th Cir. 1992), is instructive. In that case we reviewed the district court's denial of judgment notwithstanding the verdict to several city employees in a § 1983 First Amendment retaliation suit brought by members of a local firefighters' union. Defendants argued that much of the evidence was circumstantial and speculative, and that little if any evidence went to personal participation. *Id.* at 976-77. We upheld the judgment in favor of the plaintiffs, noting that "in a § 1983 proceeding circumstantial evidence generally plays a major role." *Id.* at 978. We further noted that the evidence, circumstantial though it may have been, was set against a backdrop of "intense emotional conflict between the City and Local 2284." *Id.* Similarly, in this case there was ample evidence of a poisonous, long-running political battle between plaintiffs and defendants, and that backdrop was insufficiently accounted for in the district court's piecemeal treatment of plaintiffs' disparity evidence as well as other evidence presented at trial.

audits of their facilities. They also alleged that OHCA demanded larger recoupments of previously billed services after they began lobbying at the Capitol. The SURS unit at OHCA was responsible for identifying suspicious and potentially fraudulent billing at numerous Medicaid-funded facilities, including those providing behavioral and mental health services. Webb, SURS's Director, testified that her unit's audit decisions were based on a combination of referrals and objective criteria run through a statistical program to spot suspicious billing patterns. Webb, Fritz, and Fogarty all denied that any audits performed by the SURS unit were retaliatory.

In its discussion of this evidence in the July 9, 2003 order, the district court found the retaliatory audit evidence sufficient to create a jury question, albeit barely:

> Evidence as to the timing and severity of [OHCA]'s audits of plaintiffs, taken in the light most favorable to plaintiffs and giving them the benefit of all reasonable inferences, might support an inference that some aspect of the audits was retaliatory. Any evidence suggesting such retaliation was purely circumstantial though and, as with the evidence relating to other instances of claimed retaliation, extraordinarily thin.

Evans v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 12 (W.D. Okla. July 9, 2003). The court did not revisit this alleged pattern of retaliation in its new trial order, in part because it found that the jury's

damages awards at the first trial must have hinged on the disparity evidence.

Although we share the district court's skepticism about the evidence offered with respect to retaliatory audits, a reasonable juror could have found for Charles and Mary Parkhurst and their facility, DFS, as against Fritz based on the evidence presented. Mary Parkhurst testified that DFS was audited by the SURS team in March 2002, and that she received an unusually large recoupment request, amounting to $16,000, soon thereafter. Charles Parkhurst testified that the basis for the recoupment decision was never explained to him. Fritz admitted that she complained to the SURS unit about DFS. This evidence, taken in conjunction with testimony showing the contentious relationship of the parties, could lead a reasonable juror to conclude that Fritz personally participated in the decision to audit DFS and that her motive in making that referral was retaliatory.

With respect to the remainder of the audit evidence, it was simply too speculative to prove personal participation or causation as to any of the defendants. Evans testified that immediately after serving an open records request he was hit with two unusually invasive audits of his facility, SOFS. He also testified that he received the results from those audits unusually quickly, and that the result of a November 27, 2000 audit was hand-delivered. Yet in light of overwhelming evidence of multiple problems at SOFS, undisputed evidence that OHCA received several referrals from employees of SOFS, and the lack of any evidence linking any of the defendants to the SOFS audits, no reasonable juror could have

found for Evans or SOFS on this basis. Audit-related testimony from Neal Thrift and John Majors was also speculative and could not form a basis for liability.

C

In addition to the audit and disparity evidence, plaintiffs introduced evidence at the first trial that defendants had blocked plaintiff providers from receiving their share of two supplemental appropriations approved by the Oklahoma state legislature in early 2000. The first appropriation amounted to $500,000, and was passed in February 2000; the second, amounting to $1.1 million, was passed in March 2000. Considering federal matching funds, these appropriations provided $5.2 million in additional funding. In its July 9, 2003 order, the district court found that the evidence relating to the supplemental appropriation created a jury question on plaintiffs' claim:

> Plaintiffs testified that, although they were successful in obtaining passage of the supplemental appropriation, none of them received any restored units. Defendant Fritz testified that restoration of units was done on a case-by-case basis, depending apparently on whether it was requested in a particular case. It was unclear from plaintiffs' evidence whether plaintiffs sought such restorations and were denied them, or whether they simply assumed the restorations would be across the board and therefore did not pursue reimbursements in each affected case.

> However, considering the evidence in the light most favorable to plaintiffs and drawing all reasonable inferences therefrom, the Court concludes the evidence was sufficient to create a jury question as to whether, in some fashion, defendants Fogarty and/or Fritz retaliated against plaintiffs by somehow denying them any portion of the units restored by the supplemental appropriation.

Evans v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 8-9 (W.D. Okla. July 9, 2003). We agree that the supplemental appropriation evidence created a question of fact for the jury and that a reasonable juror could have found against Fritz and Fogarty on this basis.

Several of the plaintiffs, including Nancy Graves-Thrift, Evans, John Majors, and Wheeler, testified that none of the supplemental appropriation was allocated to their facilities via restoration of units previously cut. They alleged that this funding, which was allocated to the OHCA general fund, was withheld from them in retaliation for their political activities. This testimony is supported by a letter from State Senator Cal Hobson to Fogarty, dated August 22, 2000. That letter reads in part:

> The case has been convincingly made to me that despite a formal restoration in the maximum number of allowable services, in practice [OFMQ] has been systematically and almost universally rejecting requests to authorize services back up to the traditional levels.

> Instead, they have been holding patients at or below the reduced limits set while the cuts were in place.

Other evidence, in addition to the Hobson letter, showed that this was a matter of heated dispute between OHCA and the Association, and that the Association met with Fogarty on the issue. At this meeting Fogarty said OHCA would not support the supplemental appropriation.

With respect to causation, Wheeler testified that Fogarty assured him he would look into the restoration of units at Wheeler's facility, and assured him the money would find its way into the providers' pockets. Fritz testified that the supplemental appropriation resulted in restoration of units to providers, but that those units were restored "on a case-by-case basis." In light of other evidence in the record, including evidence that Fritz and Fogarty supervised OFMQ approvals to private providers, a reasonable juror could find against Fritz and Fogarty on the basis of this evidence.

Plaintiffs alleged a fourth pattern of retaliation, specific to SOFS. They claimed that SOFS' Medicaid contract was terminated in January 2001 in retaliation for Evans' political activities. Specifically, plaintiffs alleged that Fritz and Fogarty retaliated against Evans by terminating his contract soon after Evans sent Fogarty a disclosure request under the Open Records Act. See Okla. Stat. tit. 51, § 24A. Evans sent that request on November 22, 2000. He received a letter from Fritz dated January 8, 2001, notifying him that his contract had been terminated. The district court found in its July 9, 2003 order that there was sufficient evidence on this question to

create a triable issue of fact for the jury: "Finally, the evidence showed the medicaid contract of [SOFS] was not renewed, which is actionable, adverse action as to it." *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 12 (W.D. Okla. July 9, 2003). The record includes evidence showing problems at SOFS. Evans hid his involvement with SOFS in violation of both OHCA rules and his Medicaid contract. It is also fairly clear there were persistent billing problems at SOFS facilities. However, we agree that a reasonable juror could have found the termination retaliatory.

There was ample evidence from which a reasonable juror could conclude that Evans' political activities were irritating to Fritz and Fogarty. Multiple communications reveal the battle Evans waged with OHCA and several OHCA documents demonstrate that OHCA paid close attention to SOFS. Furthermore, some evidence suggested that Fritz and Fogarty were personally involved in the termination decision. An internal OHCA document showed that Fogarty was personally involved in a decision to hold SOFS' termination in abeyance following a state representative's request to keep SOFS' facilities open. Accordingly, a reasonable juror could have found the termination decision to be retaliatory.

E

Plaintiffs expended substantial time at the first trial offering evidence of allegedly hostile, defamatory, and threatening comments made to individual plaintiffs by Fogarty and Brown. The district court relied on this evidence to deny JMOL to Brown and Fogarty as to all individual plaintiffs

except Holcomb (who did not actively lobby before the state legislature), relying on *Suarez*. It recognized that federal courts have historically been chary of extending § 1983 liability to defamation, *see Paul* v. *Davis*, 424 U.S. 693, 702 (1976), but held that a § 1983 claim may succeed if defamation is "coupled with some threat, sanction or similar retaliatory action." *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 12 (W.D. Okla. July 9, 2003). Without reaching the question of whether we find *Suarez* persuasive, we discern no basis in the record for holding Fogarty or Brown liable because of their comments to plaintiffs.

Nancy Graves-Thrift testified that, while she was in a public restroom at the state Capitol, Brown said: "[Y]ou all are wasting your time here. These people can't help you. We can help you. You're just making my job harder." She further testified that Fogarty said to her, "[Y]ou're not helping me, you're hurting me." Finally, she testified that she witnessed Brown "flip off" John Majors (testimony which Majors corroborated). Charles Parkhurst testified that while he stood outside a committee room at the Capitol, Fogarty asked him, "What can we do to make [House Bill] 1075 go away?" Cynthia Majors testified Fogarty threatened that if her husband John Majors continued to lobby at the Capitol, "he could send someone down to investigate [her] nursing home for fraudulent billing." Gerrol Adkins, Cynthia Majors' father, corroborated her testimony on this point. John Majors testified that he attended a meeting with Fogarty and various state legislators at which Fogarty labeled the members of the Association "frauds and crooks." Finally, Evans

testified that he spoke to Fogarty on the phone while at the Capitol and Fogarty asked, "Do you think you could talk to your group and see if you could get them to stop trying to get this House Bill 1075 passed?"

In *Paul*, the Court held that injury to reputation, alone, is insufficient to establish a deprivation of a plaintiff's Due Process rights. 424 U.S. at 712. Rather, plaintiffs must show that a "right or status previously recognized by state law was distinctly altered or extinguished." *Id.* at 711; *see also Siegert* v. *Gilley*, 500 U.S. 226, 234 (1991). Accordingly, defendants' comments, even if defamatory or hostile, cannot form the basis for a § 1983 action absent some ancillary change in plaintiffs' status (*i.e.*, injury), which plaintiffs failed to demonstrate. *See Hardeman* v. *City of Albuquerque*, 377 F.3d 1106, 1118-19 (10th Cir. 2004) ("We have never found a First Amendment violation on the basis of disparaging comments alone.").

On the other hand, threats of official sanctions aimed at discouraging protected activity can form the basis of a constitutional violation. *See Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 67 (1963). Yet no reasonable juror could find that any of the alleged comments, with one possible exception, could constitute a threat that would "chill a person of ordinary firmness." *Worrell*, 219 F.3d at 1212. Nor is *Suarez* on point. In that case a defendant told plaintiffs that it would "become his mission to cause as much pain, damage, and injury as possible to [them]." 202 F.3d at 680. He further threatened that he would "inflict the maximum degree of penalty" if plaintiffs refused to agree to a temporary injunction.

Id. While the statements alleged to have been made by defendants in this case evince a level of discourse that falls well short of our public ideals, none of the comments are analogous to the specific threats at issue in *Suarez*.

The one possible exception to this analysis is the alleged threat made by Fogarty to Cynthia Majors. While we are skeptical that the phone call between Fogarty and Cynthia Majors could be construed as an "imminent [threat of] adverse regulatory action," *see Blankenship* v. *Manchin*, 471 F.3d 523, 529 (4th Cir. 2006), we need not reach the issue. The jury could have imposed liability on Fogarty with respect to Cynthia Majors and her facility, Morning Star, based on the other alleged patterns of retaliation. *See* Part III.A *supra*. Cynthia Majors' membership in the Association includes her in the group of plaintiffs that have established political activity on the facts of this case. Evidence of causation and injury are discussed above.[15]

Accordingly, we conclude it was error for the district court to deny JMOL to Brown as to all plaintiffs following the first trial. The district court based its denial to Brown on her comments labeling some of the defendants "crooks" and "frauds," holding that "[s]uch comments, if made, arguably go beyond

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[15] Defendants argue on appeal that Oklahoma's two-year statute of limitations for § 1983 claims, see Okla. Stat. tit. 12, § 95, bars recovery on the basis of the Cynthia Majors call, because that call occurred in March 1999. Because defendants did not raise this defense below, however, we consider it waived. *See Malandris* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 152, 1171-72 (10th Cir. 1981).

the scope of that which the First Amendment protects." *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 11 (W.D. Okla. July 9, 2003). Yet for the reasons stated above, such comments are at most defamatory, and do not, standing alone, provide a basis for recovery in a § 1983 action.[16] As to the other patterns of retaliation discussed in the preceding sections, plaintiffs offered no evidence that Brown had any authority with respect to OFMQ or the SURS unit, or that she personally participated in that retaliatory activity. Plaintiffs' claims against Brown are unsupported by the evidence, and are properly dismissed as a matter of law.[17]

IV

Defendants argue that even if the evidence at the first trial were sufficient to support a finding of liability, damages to both the corporate and individual plaintiffs were "so excessive as to shock the judicial conscience and to raise an irresistible

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[16] We take no position on whether the terms "crooks" and "frauds," used in this context, were in fact defamatory, as opposed to words of general disparagement or abuse. We also note, for the sake of clarity, that the evidence is ambiguous as to whether these remarks were attributed to Brown or Fogarty.

[17] Plaintiffs argue that Brown waived her challenge to the denial of JMOL after the first trial by insufficiently specifying the grounds for JMOL in her Rule 50(a) motion. Although plaintiffs' response to Brown's motion for JMOL took issue with Brown's testimony on many grounds, including her "flagrant disregard for the truth and constant willingness to say anything to promote half truths or non-truths," it says nothing in regard to preservation of this issue. Therefore plaintiffs may not now argue waiver on the part of Brown, having waived this objection themselves. *See Guides, Ltd.* v. *Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1076 n.3 (10th Cir. 2002).

inference that passion, prejudice, corruption or improper cause invaded the trial," *see Fitzgerald* v. *Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1261 (10th Cir. 1995), and, in the case of the corporate plaintiffs, without any economic basis.[18] The amount of damages awarded at the first trial, both to the corporate and individual plaintiffs, was a matter of concern to the district court, and was a key factor in its granting a new trial. *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 3 (W.D. Okla. Aug. 25, 2003) ("The sufficiency of the evidence to support the damages awarded in this case is also central to the Court's conclusion that a new trial must be ordered."). The court primarily took issue with the awards to the corporate plaintiffs, finding the jury's allocation of damages to be "formulaic,"[19] and further

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[18] Both Fritz and Fogarty limit their specific damages challenges to the second trial verdict. Fogarty's entire argument in his principal brief with respect to the damages awarded at the first trial is a paragraph addressing the propriety of the new trial order, not the awards themselves. Fritz's argument on this point in her principal brief is similarly skeletal – she devotes all of four lines to the matter, none of which preserve specific objections or mention specific plaintiffs. This would normally constitute waiver as to the damages awarded at the first trial. *See Adler* v. *Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived."). Nevertheless, in light of the unusual procedural posture of this case and the similarity between the first and second trial damage awards, we will consider this issue preserved. *See Sussman* v. *Patterson*, 108 F.3d 1206, 1210 (10th Cir. 1997) (holding that the "general waiver rule is not absolute, . . . and we may depart from it in our discretion") (alteration omitted).

[19] Insofar as the district court found that the allocation of individual damages between the defendants raised an inference that passion or prejudice infected the first trial verdict, we note (...continued)

finding that the awards could not be supported by any plausible measure of lost profits. *Id.* at 5. It also deemed the individual damages awards to be "plainly excessive." *Id.* at 6.

Our review of a jury's findings with respect to damages is limited to whether they are supported by substantial evidence. *Dodoo* v. *Seagate Tech., Inc.*, 235 F.3d 522, 531 (10th Cir. 2000). "[A]bsent an award so excessive or inadequate as to shock the judicial conscience and raise an irresistible inference that passion, prejudice or another improper cause invaded the trial, the jury's determination of the amount of damages is inviolate." *Id.* (quotation and alteration omitted). When an appellate court concludes a damages award was erroneously excessive, but that no error tainted the jury's finding of liability, it may order a remittitur or direct a new trial. *See Malandris*, 703 F.2d at 1168. With these standards in mind, we turn first to the individual plaintiffs' awards, and then to the corporate plaintiffs' awards.

A

1

In the first trial, the jury awarded Evans $300,000 in compensatory damages as against Fogarty and $150,000 as against Fritz. These sums appear to be at the upper range of emotional damages upheld in this circuit, *see Dodoo*, 235 F.3d at 532 (affirming emotional damages in the amount

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that that allocation of liabilities does not shock the conscience of this court upon review of the evidence.

of $125,000); *Smith* v. *Nw. Fin. Acceptance, Inc.*, 129 F.3d 1408, 1416 (10th Cir. 1997) (affirming emotional damages in the amount of $200,000), but on our review of the record, we cannot say that they shock the judicial conscience. Evidence presented at trial allowed the jury to find that Fritz and Fogarty acted to terminate Evans' Medicaid contract, effectively putting him out of business. Evans took the lead for the Association in filing a disclosure request with the OHCA, and some evidence suggested that Evans suffered targeted retaliation as a result of that request. Moreover, Evans testified to engaging in a long-running battle with OHCA officials to keep his facilities open. He stated that his struggles to keep open SOFS facilities left him with a large personal debt, caused him substantial stress over a number of years, and caused him to lose 25-30 pounds. Such testimony supported a finding that he lived in constant fear of retaliation by OHCA against his business.

Contrary to defendants' suggestion, there is no rule in this circuit requiring corroboration of a plaintiff's testimony to support an emotional damages award. *See, e.g.*, *Dodoo*, 235 F.3d at 532; *compare Koopman* v. *Water Dist. No. 1*, 41 F.3d 1417, 1420 (10th Cir. 1994) (denying emotional damages when no witness testimony corroborated plaintiff's mental state, and circumstances afforded no basis to infer stress was caused by a recoverable injury). Nor do we accept Fogarty's argument that Evans' testimony referred solely to economic concerns – rather, Evans' testimony went to emotional distress caused by Fritz and Fogarty's retaliation and was sufficient to support an award of emotional damages.

As to the district court's finding that *Wulf* v. *City of Wichita*, 883 F.2d 842 (10th Cir. 1989), set a $50,000 "guidepost" for emotional distress damages, that conclusion misreads our holding. In *Wulf* we reduced an emotional damages award of $250,000 to $50,000 in a First Amendment retaliation case in which the retaliatory injury was the loss of the plaintiff's job. *Id.* at 875. Nothing in *Wulf* contradicts the basic principle that a jury's damages award is highly specific to the facts and circumstances of the case. More generally, it bears repeating that compensation in cases involving constitutional rights should not be approached in a miserly fashion. "It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right." *Foster* v. *MCI Telecomms. Corp.*, 773 F.2d 1116, 1121 (10th Cir. 1985). Under that relatively generous standard, and carefully considering the facts of this case, we cannot say that the jury's compensatory damages award to Evans shocks the judicial conscience.

2

The jury awarded Wheeler $177,000 in compensatory damages against Fogarty and $88,500 in compensatory damages against Fritz. This award finds no basis in the record. Wheeler did not testify that he suffered any emotional distress, nor could any other evidence introduced at trial support an inference that he suffered such distress. Accordingly, Wheeler failed to prove compensable injury as to any of the defendants, and only nominal damages were appropriate. *See Lippoldt* v. *Cole*, 468 F.3d 1204, 1220-21 (10th Cir. 2006) (upholding

district court award of nominal damages in a § 1983 action due to plaintiffs' failure to prove compensable injury). We remand the verdict in favor of Wheeler with directions that the trial court enter a remittitur order for acceptance of a judgment of $1 in nominal damages against Fogarty and $1 in nominal damages against Fritz.

3

As to the remaining individual plaintiffs, the jury awarded compensatory damages ranging from $450,000 (Cynthia Majors) to $1,350,000 (Neal and Nancy Thrift, individually).[20] With the exception of the Cynthia Majors award, all other individual plaintiffs were awarded at least $900,000. Although all of those awards are supported by at least some evidence that the plaintiff receiving the award suffered emotional distress, we conclude these awards are so excessive as to shock the judicial conscience, and that remittitur is appropriate. As stated *supra*, our discretion to review jury awards is limited, and our approach is necessarily deferential. Nevertheless, even recognizing the unusual circumstances of this case and the threat defendants posed to plaintiffs' livelihoods, the jury's awards to the remaining individual plaintiffs so far outpace emotional damages awards sanctioned in this and other circuits that we are compelled to order remittitur.

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[20] These amounts are net of any damages awarded against Brown.

There is precedent in this circuit for an appellate panel to actually set the amount of the remittitur. *See Malandris*, 703 F.2d at 1178; see also 11 Wright et al., Federal Practice and Procedure: Civil 2d § 2820 ("If the appellate court concludes that the verdict is excessive, it need not necessarily reverse and order a new trial. It may give plaintiff an alternative by ordering a new trial unless plaintiff will consent to a remittitur in a specified amount."). That is the resolution sought by plaintiffs in the event we were to reinstate some or all of the compensatory damages awarded at the first trial. We deny that request.

Notwithstanding our authority to do so, we are reluctant to invade the province of the trial court in setting a remittitur amount, as the panel did in *Malandris*. The district court has heard all of the evidence, and is in a better position to select the amount of an appropriate remittitur than is this panel. A jury has twice awarded compensatory damages to the individual plaintiffs, and the district court has heard all of that evidence. Having reviewed the record, which is more than 16,000 pages in length, we are convinced that the amount of remittitur should not be so small as to amount to no award at all, nor that the reduction as to any individual plaintiff be unreasonable. There are not many cases in this circuit to guide the district court on this point, but we do note that the panel's reduction in *Malandris* was two-thirds.

Yet we must qualify our holding with respect to two of the remaining individual plaintiffs – Cynthia Majors and Mary Parkhurst. The only evidence which could support an award of emotional damages

in favor of Cynthia Majors was her testimony regarding the Fogarty phone call, and John Majors' testimony that defendants' retaliation had damaged their marriage. Moreover, it was undisputed that Cynthia Majors played a minor role in the Association's lobbying activities and had no role in the day-to-day operation of Morning Star. Her threadbare testimony is quite similar to the plaintiff's testimony in *Wulf*. Like the court in that case, "we agree with defendants that [although plaintiff's] testimony and the evidence presented are not the most graphic and detailed display of emotional and mental anguish and distress, we cannot conclude that some award for such anguish and distress is unsupported by substantial evidence." 883 F.2d at 875. Accordingly, the standard of reasonableness with respect to the Cynthia Majors award may counsel a reduction greater than that in *Malandris*.

We reach the same result with regard to the jury's emotional damages award to Mary Parkhurst. She offered testimony that was tangential, at best, to the issue of emotional distress: "Well, I have gray hair now. And it does make – it's very stressful. And I tell you, I feel like a little mouse backed off in a corner with a big cat sitting up there grinning at me ready to pounce any time. That's how we feel because of the threat that we feel. All the time we live with that fear." Like Cynthia Majors' testimony, this evidence is simply too thin to support a large award for emotional distress. Accordingly, the standard of reasonableness with respect to the Mary Parkhurst award may also counsel a reduction greater than that in *Malandris*. With respect to all

individual plaintiffs we hold, like the Malandris panel, that they are free to accept the remittitur ordered by the district court or, in the alternative, to pursue a new trial as to all issues, including liability. *See* 703 F.2d at 1178.

B

Following the jury's verdict in favor of all plaintiffs and against all defendants on liability and compensatory damages, plaintiffs sought punitive damages against all defendants in a second-stage proceeding. Evans, Nancy Graves-Thrift, and John Majors testified during the punitive damages stage, as did Brown, Fritz, Fogarty, and Mitchell. The jury subsequently awarded punitive damages in the amount of $50,000 in favor of all individual plaintiffs against all defendants, for a total punitive damages award of $1,350,000. Defendants challenge these awards as unsupported by the evidence, but do not argue that the amount of the awards constitutes a Due Process violation. *See, e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003). The district court did not mention the jury's punitive damages awards in the new trial order or in its July 9, 2003 order, but vacated these awards along with all others by granting defendants a new trial.

Punitive damages are available in § 1983 actions, but the burden of proof with respect to punitive damages is higher than that required to find liability. Such damages are only available "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. The focus must be on whether the defendant's actions call for deterrence and

punishment over and above that provided by compensatory awards." Hardeman, 377 F.3d at 1121. As with the other damages awards, we review the sufficiency of the evidence de novo, and examine the evidence in the light most favorable to the plaintiffs. *Nieto* v. *Kapoor*, 268 F.3d 1208, 1221 (10th Cir. 2001). We note, however, that we are without the district court's views on the matter.

Nevertheless, we are satisfied that a reasonable juror could conclude that Fritz and Fogarty acted with "reckless or callous indifference," if not "evil motive or intent," to the rights of the defendants. *Hardeman*, 377 F.3d at 1121. Plaintiffs met with persistent hostility from Fritz and Fogarty, and were subject to a wide variety of injuries in retaliation for their political activities. A reasonable juror could conclude, based on the evidence before it, that Fogarty and Fritz wanted to silence members of the Association, were embarrassed by their lobbying efforts, and acted to starve them of Medicaid funding in an effort to put them out of business. This type of behavior is the sort that is properly answered by punitive damages, which act "to punish what has occurred and to deter its repetition." *Youren* v. *Tintic Sch. Dist.*, 343 F.3d 1296, 1309 (10th Cir. 2003). Although defendants cite to *Fuerschbach* v. *Southwest Airlines Co.*, 439 F.3d 1197 (10th Cir. 2006) as analogous to the facts at issue here, we are unconvinced. Defendants conduct in that case, which we described as a "joke gone bad,"[21] *see id.*

[21] In that case, the plaintiff's fellow employees convinced two Albuquerque police officers to conduct a mock arrest of plaintiff as a practical joke. *Id.* at 1201-02.

1200, is a far cry from defendants' conduct in this case. Accordingly, we reinstate the punitive damages awarded at the first trial against Fogarty and Fritz in favor of all plaintiffs.

C

Finally, we review whether the evidence was sufficient to support the jury's award of compensatory damages to the corporate plaintiffs. These damages amounted to $24 million – $6 million to SOFS, $6 million to Morning Star, $6 million to Rustling Winds, $2 million to JCH, $2 million to DFS, and $2 million to Serenity Springs. As with the individual damages, liability was allocated on a 60/30/10 basis between Fogarty, Fritz, and Brown. Total corporate damages, as well as the allocation of damages between the corporate plaintiffs, were consistent with plaintiffs' counsel's suggestion at closing. That request was itself based, loosely, on McDaniel's testimony. McDaniel's corporate damages calculation represented: (1) the difference between the average per unit reimbursement rate paid to the plaintiff providers and all other private providers during the relevant period, (2) multiplied by the average number of units billed by all plaintiff providers per month, (3) multiplied by the number of months between the beginning of plaintiffs' lobbying efforts and the filing of the Rustling Winds lawsuit, (4) plus interest.

Before the district court, defendants argued that McDaniel's calculations did not provide a plausible estimate of the profits lost as a result of defendants' retaliation. This precise issue was at the heart of the district court's justification for granting a new trial: "Here, plaintiffs made no effort to quantify the

economic losses of each corporate plaintiff." *Evans* v. *Fogarty*, No. CIV-01-0252-HE, slip op. at 4 (W.D. Okla. Aug. 25, 2003). We agree that while plaintiffs' evidence was sufficient for a jury to find liability for the corporate plaintiffs against Fritz and Fogarty, their offering of proof as to the corporate damages was woefully insufficient. Moreover, we agree with the district court that remittitur is inappropriate as to the corporate damages, "there being no apparent basis in the evidence for setting some lesser amount of damages." *Id.* at 9.

Recognizing that there have already been two trials addressing damages in this case, we nevertheless conclude with great reluctance that a third trial on damages is necessary. Given that the juries in the first and second trials reached different conclusions as to defendants' liability and as to which plaintiffs prevailed, the corporate damages awards from the second trial are not applicable to the first. *See Wilson* v. *Burlington N. R.R. Co.*, 804 F.2d 607 (10th Cir. 1986) (reversing grant of new trial and reinstating first jury's verdict where second jury reached different conclusions as to liability of parties); *Diamond Shamrock Corp.* v. *Zinke & Trumbo, Ltd.*, 791 F.2d 1416 (10th Cir. 1986) (reinstating first jury's verdict where prevailing parties differed). We therefore exercise our authority to order a new trial limited solely to corporate damages. *See Malandris*, 703 F.2d at 1168.

Plaintiffs' arguments in favor of reinstatement of the corporate damages awards are unpersuasive. They correctly identify precedent establishing that we do not demand precision in our review of a jury's award for economic damages. *See, e.g., Bitler* v. *A.O.*

Smith Corp., 400 F.3d 1227, 1242 (10th Cir. 2004) (upholding an award for future medical expenses that was "not based on specific and substantial evidence"); *Fiedler* v. *McKea Corp.*, 605 F.2d 542, 547 (10th Cir. 1979) ("[M]athematical exactness is not required."). Yet McDaniel's economic loss calculation was not simply imprecise – rather, it had the air of fantasy.

We reemphasize that "[t]he purpose of § 1983 damages is to provide compensation for injuries caused by the violation of a plaintiff's legal rights. No compensatory damages may be awarded absent proof of actual injury." *Jolivet* v. *Deland*, 966 F.2d 573, 576 (10th Cir. 1992) (citation omitted). "Although damages for lost business opportunities need not be supported by mathematical certainty, they must be based on reasonable proof. Amounts that are speculative, remote, imaginary, or impossible of ascertainment are not recoverable." *Fitzgerald*, 68 F.3d at 1264 (quotation omitted). In order for a juror to accept McDaniel's lost profits calculation, she would have to make a series of outlandish assumptions that find little support in the record. Namely, she would have to find not merely that the disparity evidence was sufficient to show retaliation, but that it accurately represented the degree of injury to the corporate providers (*i.e.*, that providers serviced identical patient populations and that no disparity existed prior to 1999). In addition, she would have to find that the reimbursement gap constituted pure lost profit to every corporate plaintiff – in other words, she would have to find that corporate plaintiffs did not scale back their operations at all due to reduced approvals. Finally,

she would have to find that the allocation between corporate providers accurately reflected the lost profits as to each.

Although there were a few bits of evidence in the record that spoke to these questions, they were not sufficient to render McDaniel's economic loss estimate anything but "speculative, remote, imaginary, or impossible of ascertainment." *Id.* Accordingly, a new trial is required to ascertain the appropriate measure of damages as to each corporate provider.

V

After entering judgment following the second trial, the district court awarded attorney fees and costs to certain plaintiffs against Fogarty and Brown. All parties now appeal that award. As discussed at length supra, we have concluded that the district court abused its discretion in granting defendants' motion for a new trial, and have reinstated the verdict from the first trial as to Fritz and Fogarty. That reinstated verdict differs substantially from the judgment entered following the second trial with respect to both liability and damages. In particular, we have dismissed all claims against Brown, such that Neal and Nancy Thrift are no longer prevailing parties against her pursuant to 42 U.S.C. § 1988(b). Given these discrepancies, we conclude that reconsideration of the fee award is necessary, and that it would unduly prejudice the parties if we were to decide the fee appeals on their merits. *See Williams* v. *Trader Publ'g Co.*, 218 F.3d 481, 488 (5th Cir. 2000) (vacating and remanding attorneys' fees when reversal of punitive damages reduced total judgment by approximately 40 percent); *Copper* v.

City of Fargo, 184 F.3d 994, 998 (8th Cir. 1999) (enforcing judgment rendered in first trial and remanding for determination of attorneys' fees); *Bunch* v. *Bullard*, 795 F.2d 384, 399-400 (5th Cir. 1986) (vacating and remanding when court reversed judgment as to certain prevailing plaintiffs); *cf. O'Rourke* v. *City of Providence*, 235 F.3d 713 (1st Cir. 2001) (reinstating verdict from first trial but upholding award of attorneys' fees from second trial when single plaintiff prevailed against defendant in both trials). Accordingly, we vacate the award and remand to the district court for a determination of appropriate fees in light of our partial reinstatement of the first trial verdict.

VI

We REVERSE the district court's grant of a new trial, REINSTATE the first trial verdict as to defendants Fritz and Fogarty, and REMAND for remittitur of certain individual damages awarded at the first trial as described in Part IV *supra*. We REMAND the corporate damages awards for a new trial limited solely to damages. We REVERSE the district court's denial of JMOL to Brown following the first trial, and REMAND with instructions to DISMISS. We also REVERSE the district court's award of partial fees and costs under 42 U.S.C. § 1988(b) and REMAND for reconsideration of the award in accordance with this disposition. All pending motions are DENIED.

ENTERED FOR THE COURT

Carlos F. Lucero
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 05-6106, 05-6109, 05-6110, 05-6112, 05-6122, 05-6358, 05-6359 & 05-6361

ALFRED MILTON EVANS, an individual; SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC., a corporation; RUSTLING WINDS, INC., an Oklahoma corporation; MORNING STAR MENTAL HEALTH SERVICES, INC., an Oklahoma corporation; DIVERSIFIED FAMILY SERVICES, INC., an Oklahoma corporation; SERENITY SPRINGS MENTAL HEALTH SERVICES, L.L.C., an Oklahoma corporation; JCH, INC., an Oklahoma corporation; NEAL THRIFT, an individual; NANCY GRAVESTHRIFT, an individual; JOHN MAJORS, an individual; CYNTHIA MAJORS, an individual; CHARLES PARKHURST, an individual; MARY PARKHURST, an individual; LEROY WHEELER, an individual; and JOEL HOLCOMB, an individual,

Plaintiffs-Appellants / Cross-Appellees,

v.

MICHAEL FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority; TERRIE FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority; and DANA BROWN, in her individual capacity, as well

as in her official capacity as Legislative Liaison for the Oklahoma Health Care Authority; TENKILLER BEHAVIORAL SERVICES INC., an Oklahoma corporation; DAVETTA MCINTOSH, an individual;

Defendants-Appellees / Cross-Appellants.

ORDER

Filed, October 23, 2007

Before TACHA, Chief Circuit Judge, McWILLIAMS, Senior Circuit Judge, and LUCERO, Circuit Judge.

Michael Fogarty's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

ELISABETH A. SHUMAKER,
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

NO. CIV-01-0252-HE
(Consolidated Number)

ALFRED MILTON EVANS, ET AL.,

Plaintiffs,

vs.

MIKE FOGARTY, ET AL.,

Defendants.

ORDER

Filed Feb. 23, 2005

Before the Court are renewed Rule 50 motions of defendants Michael Fogarty, Terri Fritz, and Dana Brown. For the reasons set out below, the Court concludes the motions should be granted in part and denied in part.

BACKGROUND

These consolidated cases[1] arise out of claims asserted by the owners and operators of multiple private facilities in Oklahoma that provide mental and behavioral health services to individuals qualifying for Medicaid assistance. The individual plaintiffs are Alfred Milton Evans, John and Cynthia Majors, Joel Holcomb, Neal and Nancy Thrift, Leroy Wheeler, and Charles and Mary Parkhurst. The corporate plaintiffs, all owned by the individual plaintiffs, are Southeastern Oklahoma Family Services, Inc., Morning Star Mental Health Services, Inc., JCH, Inc., Rustling Winds, Inc., Serenity Springs, L.L.C., and Diversified Family Services, Inc. Defendants Michael Fogarty, Terri Fritz and Dana Brown, sued in their individual capacities, are current or former officers or employees of the Oklahoma Health Care Authority ("OHCA"), the agency established by the State of Oklahoma to administer the Medicaid program.

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[1] The original cases – *Evans* v. *Fogarty*, CIV-01-252-HE and *Rustling Winds, Inc.* v. *Fogarty*, CIV-01-557-HE – included, as plaintiffs, the patients of one of the mental health care providers, plus other health care providers and their owners and, as defendants, the Oklahoma Foundation for Medical Quality and all defendants in their official capacities. The claims initially pled included due process and Medicaid Act violations. After multiple motions to dismiss and for summary judgment were filed and resolved, the issues for trial were reduced to a First Amendment retaliation claim asserted by the plaintiffs against defendants Fogarty, Fritz, Brown, Dr. Lynn Mitchell, and Jana Webb, in their individual capacities, and against the members of the Oklahoma Health Care Authority's Board of Directors for injunctive relief. At the conclusion of the first trial the Court granted the Fed.R.Civ.P. 50 motions of defendants Mitchell and Webb and also, in its July 9, 2003, Rule 50 order, declined to order any injunctive relief.

Plaintiffs initially asserted multiple claims against these and other defendants, based on their alleged discriminatory or unfair treatment of plaintiffs. After the disposition of various pretrial motions, the sole claim remaining for trial was plaintiffs' First Amendment retaliation claim. Plaintiffs alleged they formed an association of private mental health providers in late 1998 to advance their interests at the state capitol and then, through the association and individually, lobbied the legislature and other state officials regarding mental health matters on behalf of themselves and their clients. Plaintiffs contended defendants retaliated against them in various ways because of their lobbying or political activities and sought both money damages and injunctive relief.

This case was first tried in April, 2003. The jury returned a verdict in favor of all plaintiffs and against defendants Fogarty, Fritz and Brown in amounts totaling $30,565,000 in compensatory damages and $1,300,000 in punitive damages. The Court later granted defendant Brown's Rule 50 motion as to certain plaintiffs and claims, but otherwise denied the defendants' Rule 50 motions. Order, July 9, 2003. Subsequently the Court concluded the jury's verdict could not be sustained under the evidence and applicable law and ordered a new trial. Order, August 25, 2003.

The second trial occurred from September 15 to September 24, 2004. With respect to the claims against defendant Fogarty, the jury found for the plaintiffs and awarded damages totaling $1,020,000 for the individual plaintiffs and $14,295,000 for the corporate plaintiffs. As to defendant Fritz, the jury

found in her favor as to all claims except those of plaintiff Holcomb and his company, JCH, Inc, returning verdicts for them of $250,000 and $325,000, respectively. As to defendant Brown, the jury found in her favor as to all claims except those of Mr. and Mrs. Thrift,[2] returning verdicts in their favor of $25,000 each.

Following bifurcated proceedings, the jury awarded punitive damages with respect to some claims, finding against Fogarty and in favor of the corporate plaintiffs in amounts totaling $300,000; against Ms. Fritz and in favor of JCH, Inc. in the amount of $7500; and against Ms. Brown and in favor of Mr. and Mrs. Thrift in the amounts of $500 each.

Defendants moved for entry of judgment in their favor as a matter of law at the conclusion of both plaintiffs' evidence and the trial and in post-trial motions.[3]

DISCUSSION

Pursuant to Rule 50, a court should enter judgment as a matter of law only when "a party has

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[2] The only claims against defendant Brown were asserted by individual plaintiffs, as the claims of Joel Holcomb and the corporate plaintiffs were resolved by the Court's July 9, 2003, order addressing Rule 50 motions after the first trial.

[3] Strictly speaking, the present motions are motions to reconsider the Court's previous oral rulings on defendants' Rule 50 motions, rather than renewed post-judgment motions, as judgment on the jury verdict has not yet been entered. However, as Rule 50 permits renewed motions, the distinction is immaterial.

been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). The Court reviews the record as a whole, drawing all reasonable inferences in favor of the nonmoving party, and disregarding all evidence favorable to the moving party that the jury is not required to believe. *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000). The court may not make credibility determinations or weigh the evidence. *Id.* "The question is not whether there is literally no evidence supporting the [nonmoving] party . . . but whether there is evidence upon which the jury could properly find [for that party]." *Century 21 Real Estate Corp.* v. *Meraj Int'l Investment Corp.*, 315 F.3d 1271, 1278 (10th Cir. 2003) (internal quotations omitted). The party must present more than a "mere scintilla" of evidence supporting its claim for a jury to properly find in its favor. *Id.* Even a case relying on circumstantial evidence must be "based on more than mere speculation, conjecture or surmise." *Bones* v. *Honeywell Intern., Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).[4] Although all rational references from the

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[4] *Bones* was decided in a summary judgment context, but the standard for granting summary judgment "mirrors" the test under Rule 50. *Reeves*, 530 U.S. at 150, citing *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250-51(1986). *See also Spray Systems of Arizona, Inc.* v. *Lin-De, Ltd.*, 173 F.3d 864, 1999 WL 147237, at * 3 (10th Cir. March 18, 1999)("However, even circumstantial evidence must be relevant and must be based on more than surmise, speculation, or conjecture."). *Lin-De, Ltd.* and the other unpublished decisions referenced in this order are cited for persuasive value only under 10th Cir. R. 36.3(B).

facts are drawn in favor of the plaintiff, "the plaintiff is not entitled to inferences based on speculation and conjecture." *Vazquez-Valentin* v. *Santiago-Diaz*, 385 F.3d 23, 29-30 (10th Cir. 2004).

In a § 1983 First Amendment retaliation case, each plaintiff must establish as to each defendant that the plaintiff engaged in constitutionally protected conduct and that the defendant, acting under color of state law, retaliated against the plaintiff by adverse action, causing the plaintiff to suffer an injury that would "chill a person of ordinary firmness from continuing to engage in that activity." *McCook* v. *Springer School District*, 2002 WL 1788529, at * 6 (10th Cir. Aug. 5, 2002). The plaintiff must prove that the adverse action was substantially motivated as a response to the constitutionally protected conduct. *Id.*[5] *Accord Wolford* v. *Lasater*, 78 F.3d 484, 488 (10th Cir. 1996).

Personal participation also must be shown to recover on a §1983 claim. *Starr* v. *Downs*, 2004 WL 2603658, at *4 (10th Cir. Nov. 17, 2004). A defendant may not be held liable under § 1983 on a respondeat superior theory. "[T]o establish supervisory liability, a plaintiff must show that 'an affirmative link exists between the [constitutional] deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise.'" *Worrell* v. *Henry*, 219 F.3d

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[5] The [i]ntent to inhibit speech ... can be demonstrated either through direct or circumstantial evidence." McCook, 2002 WL 1788529, at * 7 (quoting Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1300-01 (9th Cir. 1999)).

1197, 1214 (10th Cir. 2000) (quoting *Meade* v. *Grubbs*, 841 F.2d 1512, 1527 (10th Cir. 1988)).

A plaintiff may rely on circumstantial evidence to meet his or her burden.[6] That may be the only way to prove certain facts, such as intent.[7] However, even circumstantial evidence must be based on more than surmise, speculation or conjecture.[8]

Applying these standards and the principles more fully set out in the instructions given to the jury, the Rule 50 motions of each defendant are considered separately.

A. Defendant Fogarty's Rule 50 motion - individual plaintiffs' claims

Fogarty urges a variety of grounds in support of his motion. Some the Court has addressed previously and finds no basis for deciding differently now.[9] Most of defendant Fogarty's other arguments

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[6] *Court's Instructions to the Jury, Direct and Circumstantial Evidence*, p. 10.

[7] *See Bisbee* v. *Bey*, 39 F.3d 1096 (10th Cir. 1994).

[8] See *York* v. *AT&T*, 95 F.3d 948, 955 (10th Cir. 1996); Commercial Standard Ins. Co., 259 F.2d 210, 212 (10th Cir. 1958)(to warrant submission to the jury "the evidence . . . must be based upon more than mere conjecture, speculation, or surmise. It must rise above mere alternative possibilities. It must bring the theory upon which reliance is placed to the level and dignity of a reasonable probability.").

[9] For example, the defendants' claims of qualified immunity were rejected previously, as was defendants' Daubert challenge to the admissibility of evidence from Dale McDaniel, plaintiffs' expert. While the Court still views McDaniel's testimony as admissible, for the reasons noted in its earlier ruling, the adequacy of that testimony/evidence to support plaintiffs' claims is discussed subsequently.

pertain to the sufficiency of the evidence to establish he retaliated against plaintiffs.

As already noted, to prevail on a First Amendment retaliation claim a plaintiff must show that he engaged in protected activity, that the defendant retaliated against and injured him,[10] and that the adverse action was substantially motivated as a response to the plaintiff's constitutionally protected conduct.[11] At trial there was substantial evidence that the plaintiffs engaged in protected, First Amendment conduct. There was also evidence from which the jury could have concluded that any retaliatory action taken by Fogarty (or the other defendants) was motivated as a response to that conduct. The Court's summary of this evidence after the first trial equally applies to the evidence presented in the second trial:

> The evidence reflects a history of disputes between plaintiffs and defendants going back to at least 1998, when plaintiffs organized themselves into a formal association and began engaging in substantial and sustained lobbying and other activities on behalf of their interests. The parties appear to

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[10] The retaliatory action must have been sufficiently significant that it would "chill a person of ordinary firmness" from continuing to engage in the activity. *Mimics, Inc.* v. *Village of Angel Fire*, 394 F.3d 836, 847 (10th Cir. 2005).

[11] *See generally Court's Instructions to the Jury, Essential Elements of Individual Plaintiffs' and Corporate Plaintiffs' First Amendment Claim under Section 1983*, pp. 17-18.

> have had substantial disagreements on a broad range of policy issues where the positions advanced by plaintiffs with the state legislature or other state authorities were adverse to positions taken by defendants. Plaintiffs were successful in blocking adoption of an emergency rule proposed by HCA in 1998. Plaintiffs proposed legislation which would have altered HCA policies and practices and would have subjected it to additional oversight. Plaintiffs' lobbying activities with the Oklahoma legislature caused defendants to have to respond to numerous legislative inquiries and/or complaints. There is evidence to support the conclusion that those legislative efforts embarrassed defendants, irritated them, and were part of a long-running series of policy and other disputes between the parties. If adverse action was in fact taken against these plaintiffs, there was evidence from which the jury could have concluded that ill will based on defendants' irritation with plaintiffs' protected activities could have motivated it. (Order, July 9, 2003, p. 5.)

The critical issue here, as with the first trial, is whether plaintiffs presented evidence from which the jury could have reasonably concluded that Fogarty took adverse action against them. In other words, did the circumstantial evidence offered by plaintiffs — and it was all, or virtually all, circumstantial —

support a reasonable inference that Fogarty retaliated against the plaintiffs in some way?[12]

What the essentially circumstantial case against Fogarty and the other defendants did or did not prove is central to many of the Court's rulings and has been of major concern throughout these proceedings. Where is the dividing line between what is proven by circumstantial evidence and "conjecture, speculation or surmise?"

The Court concludes that merely showing that a defendant is the head of an agency or an agency program area, committed unrelated "bad acts," and had serious disputes or disagreements with a plaintiff, combined with evidence that the plaintiff was treated unfavorably by the agency or experienced some sort of undesirable agency action, is not enough, in and of itself, to support an inference that the defendant caused whatever harm the plaintiff objects to.[13] To hold otherwise would be

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[12] Plaintiffs cite *Reeves*, 530 U.S. at 133 for its discussion of the impact of circumstantial evidence in a Rule 50 context. While much of the Reeves discussion undoubtedly has broader application than the circumstances of that case (involving age discrimination and use of the *McDonnell Douglas* framework to determine intent/motive), there was no dispute in Reeves that adverse action had been taken against the plaintiff — he had been fired. Here, the inquiry essentially focuses not on Fogarty's intent, but on whether the evidence was sufficient to show that he actually did something to the plaintiffs.

[13] In responding to the defendants' renewed Rule 50 motions, plaintiffs correctly note that certain of their claims or theories have previously survived summary judgment or Rule 50 motions at the conclusion of the prior trial on similar evidence. However, as already mentioned, the sufficiency of the circumstantial evidence to prove retaliation has always been of (...continued)

inconsistent with the principle that a supervisor is not liable for the actions of subordinates merely because of his position. An affirmative link between the constitutional deprivation and his personal participation, exercise of control or direction or failure to supervise must be shown.[14] It also would conflict with the principle that the evidence, whether circumstantial or otherwise, must be sufficient to "bring the theory upon which reliance is placed to the

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central concern to the Court. The Court's order on the Rule 50 motions following the first trial noted the evidence suggesting retaliation was purely circumstantial and that "[t]he evidence of any retaliation by any defendant was extraordinarily thin." Order, July 9, 2003, pp. 8, 12. The order for new trial similarly observed: "Here, however, much of the evidence offered to establish retaliatory activity by defendants Fogarty, Fritz and Brown bordered on pure speculation and, in some instances, was based on little more than proof that the particular defendant was a supervisor of some activity at OHCA." Order, August 25, 2003, p. 3. More recently, when considering defendants' Rule 50 motions during the second trial, the Court stated: "I don't know where the dividing line is between the outer limits of a circumstantial case and pure speculation. But I think this case is on it if not over it." Transcript, pp. 1418-19. Focusing on the question not only of whether some adverse action occurred, but also of whether there was evidence — tested against the standards for circumstantial evidence — from which it could be reasonably inferred that the particular defendant (here, Fogarty) actually caused, or participated or acquiesced in it, the Court concludes the evidence was ultimately lacking.

[14] It is also inconsistent with the principle embodied in Fed. R. Evid. 404 that evidence of other bad acts is inadmissible to prove a person's character to demonstrate action in conformity therewith. Here, of course, the issue is not the admissibility of any particular evidence. Rather, the Court notes the underlying policy of Rule 404 only as it informs the discussion of the extent of the inferences that may properly be drawn from circumstantial evidence.

level and dignity of a reasonable probability." *Commercial Standard Ins. Co.* v. *Feaster*, 259 F.2d 210, 212 (10th Cir. 1958). A plaintiff must ultimately prove not just that something might have happened, but that it in fact did. *See Williams* v. *Boorstein*, 663 F.2d 109, 115 (D.C. Cir. 1980) ("What 'could have been' is never alone a sufficient foundation for a finding of what really 'was' . . . .").

Much of plaintiffs' evidence related to complaints with the Medicaid system (or provider reimbursement system) generally. There was substantial evidence that money was always in short supply, with the available public funds rarely, if ever, keeping up with demand for services. Reimbursement levels for providers were modest. Cutbacks in funding occurred at various times incident to recurring budget shortages or overruns. At some point, Oklahoma contracted with the Oklahoma Foundation for Medical Quality ("OFMQ") to act as a gatekeeper by reviewing and authorizing services requested for Medicaid reimbursement, at least partially to control the growth in the cost of mental health services. This prior approval and review process resulted in burdensome paperwork requirements, the frustration of having OFMQ personnel cut back prior authorization requests,[15] an onerous appeals process, etc. There was not, though, evidence from which a jury could have reasonably concluded that these circumstances were due to

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[15] Plaintiffs were critical of OFMQ personnel without medical or advanced degrees overruling, in some cases, diagnostic or treatment decisions made by persons with those credentials.

Fogarty trying to single out and punish the plaintiffs — these facts and circumstances applied to all private providers.[16]

Some of the evidence introduced was in the nature of alleged bad acts of Fogarty, including his use of the emergency rulemaking process when, in the plaintiffs' view, permanent rules should have been used, his alleged lies to legislators about his contacts with federal authorities, and his failure to respond to requests for information. However, regardless of what that evidence may have suggested in terms of background of the controversies or intent/motivation, it did not show adverse or retaliatory action against plaintiffs.

Plaintiffs also introduced evidence that they were audited by the SURS unit of OHCA. Plaintiffs objected to the fairness of some of the audit findings and, in some cases, their timing. However, there was no evidence indicating that Fogarty had any involvement in ordering the audits or the manner in which they were conducted. Although it was shown that some plaintiffs have appeals pending now before Fogarty regarding adverse findings made against them in past audits, there was no evidence that he has acted adversely to them in conjunction with those appeals.

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[16] While there was evidence that community mental health centers ("CMHC's) were funded in different, and sometimes more favorable, ways than private providers, there was no suggestion that Fogarty was responsible for whatever differences existed between private providers and CMHC's or that any differences were directed at, or a reaction to, plaintiffs.

As to plaintiffs Evans and Southeastern Oklahoma Family Services, Inc., there was evidence that the corporation's Medicaid provider contract was terminated in January, 2001, following adverse audit findings at two of its facilities.[17] There was not, though, any evidence that Fogarty instigated or caused the termination.

At trial the plaintiffs established they were substantially involved in seeking a supplemental appropriation from the legislature in 2000. OHCA cut the maximum number of units available for certain services in 1999 as a cost control measure. Subsequently, plaintiffs lobbied for supplemental funding to restore the cuts. Two supplemental appropriations measures were passed, totaling approximately two million dollars.[18] Plaintiffs' complaint was that, notwithstanding the passage of the supplemental appropriation for which they lobbied, they received none of the additional money. The evidence was disputed as to whether plaintiffs had complied with the procedures announced by OFMQ to restore unit levels after passage of the bills. There was evidence suggesting that at least some of the plaintiffs sought and received increases in authorized units, but, taking the evidence in the light most favorable to the plaintiffs, there was evidence from which the jury could have concluded plaintiffs were not given funds or restored units that they should have received. Significantly, there was

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[17] Transcript, pp. 676-85; Plaintiffs' Exhibit 22.

[18] With federal matching funds, the total increased funding was approximately $6.0 million.

no evidence of Fogarty's involvement in OFMQ's treatment of any requests plaintiffs made for increases in maximum units. There was evidence that at least one of the plaintiffs provided information to Fogarty relating to restoration of the requests, but nothing to suggest he blocked the requests or took any adverse action with respect to them.

With the exception noted below, the evidence simply was insufficient to support an inference that Fogarty took adverse or retaliatory action against plaintiffs. It is not enough to speculate that he might have.

There was proof the defendants, in various meetings with legislators, referred to some of the plaintiffs as "crooks and frauds." Although it was not altogether clear as to who said what, or who at the various meetings was called a crook or a fraud, there was evidence from which the jury could have concluded Fogarty made these comments about some of the plaintiffs. While § 1983 does not provide a federal remedy for defamation, *Rakowski* v. *Merritt*, 2003 WL 254878, at *1 (10th Cir. Feb. 5, 2003)(defamation is not a constitutional violation), defamatory language accompanied by some "threat, coercion, or intimidation intimating that punishment, sanction or adverse regulatory action will imminently follow," may support a First Amendment retaliation claim. *Suarez Corp. Indust.* v. *McGraw*, 202 F.3d 676, 687 (4th Cir. 2000).[19]

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[19] The evidence most clearly suggesting an explicit threat consisted of testimony of phone calls involving Fogarty that (...continued)

Here, although a close question, the Court concludes there was evidence from which the jury could reasonably have found that Fogarty defamed and at least implicitly threatened those plaintiffs present in the meetings.

This same conclusion cannot be drawn, though, as to plaintiffs Mr. Holcomb and Mrs. Parkhurst. There was no evidence that they lobbied at the State Capitol, were in the meetings or were present when the particular statements were made. Absent some basis for concluding the remarks were in some way directed at them, the jury awards in their favor cannot be sustained on the basis of these alleged comments. Mr. Holcomb and Mrs. Parkhurst have failed to show that Fogarty's remarks caused them personally "to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity." *Mimics, Inc.* v. *Village of Angel Fire*, 394 F.3d 835, 847 (10th Cir. 2005).[20] Plaintiffs Holcomb and Parkhurst cannot recover based on injury to another.[21]

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occurred in March of 2001, prior to the applicable limitations period for plaintiffs' claims. Transcript, pp. 1041, 1050 (Mrs. Majors' testimony). However, viewing all the evidence in the light most favorable to plaintiffs, there was other evidence from which the jury might have inferred that at least some implicit threat accompanied the alleged defamatory statements.

[20] Mrs. Parkhurst essentially conceded that Fogarty had done nothing to her personally, but asserted he had damaged her business. Transcript, pp. 1032-33.

[21] The jury was instructed that each plaintiff had the burden of establishing both his or her entitlement to relief and the amount of damages he or she had suffered. *See* Court's Instructions to the Jury, pp. 7, 17-18, 25-29.

In sum, while most of the evidence did not demonstrate adverse action by Fogarty against the individual plaintiffs, the Court concludes the evidence as to his alleged threatening and defamatory statements, taken in the light most favorable to plaintiffs, was sufficient to support the jury's finding that Fogarty was liable to the individual plaintiffs, excepting plaintiffs Holcomb and Parkhurst.

In support of his request for judgment as a matter of law, Fogarty also challenges the damages awarded to the individual plaintiffs. He claims both that the verdicts duplicated the damages granted the corporate plaintiffs, to the extent they included compensation for the decreased value of the plaintiffs' businesses, and that the evidence did not support recovery for mental distress.

Several aspects of the damages awarded in this case are troubling. In the first trial, the individual plaintiffs essentially sought relief for their mental anguish or similar intangible harm, with the corporate plaintiffs asserting claims for economic damages. Although the nature of the individual plaintiffs' damages claims in the second trial was not completely clear, it appears they too were offering evidence of economic loss.[22] Several of the plaintiffs opined that their businesses had been worth some substantial amount as going concerns,[23] but, due to

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[22] See Transcript, pp. 705-13.

[23] Transcript, p. 1246 (Mr. Majors' testimony), $500,000 for Morning Star; p. 1104 (Mr. Wheeler's testimony) , $500,000 for Serenity Springs; p. 1000 (Mr. Parkhurst's testimony), $500,000 (...continued)

the defendants' actions, were now worthless.[24] Fogarty suggests that, as a matter of law, basing damages on that theory would constitute a double recovery, as those were the same damages the corporate plaintiffs sought. The Court agrees.

To the extent any plaintiff's business had a going concern value, that value was based on the business' ability to generate a profit.[25] To award the corporate plaintiffs damages for profits lost as a result of a defendant's actions and then permit the individual owners to recover what is, essentially, the capitalized value of those same profits, would result in a double recovery.[26] Consequently, the damage awards to the individual plaintiffs in this case cannot be justified on the basis of the lost value of their businesses or investments.[27] They can, however, be sustained as compensation for the plaintiffs' emotional distress.

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for Diversified Family Services; p. 86 (Mr. Thrift's testimony), $1,000,000 for Rustling Winds; p. 1173 (Mr. Holcomb's testimony), $300,000 for JCH, Inc.

[24] No plaintiff offered a specific basis for their estimated value of their business. Although unnecessary to the decision, it is questionable whether an otherwise proper damages award could be based on nothing more specific than an owner's conclusory opinion as to estimated value. Other issues also exist as to this type of claimed damage.

[25] The income of these businesses was substantially derived from payment for the services they rendered.

[26] Whether there is a sufficient basis for recovery of lost profits by the corporate plaintiffs is discussed subsequently.

[27] *See* Court's Instructions to the Jury, Damages - Individual Plaintiffs, p. 27, specifying that an individual plaintiff may, in addition to damages for emotional or mental anguish, recover economic losses caused by the constitutional violation, but not (...continued)

"Testimony by a plaintiff, and by one close to him or her, of emotional distress, supported by inferences readily drawn from the facts surrounding and following from the denial of procedural due process are sufficient to support an award of damages." *Koopman* v. *Water Dist. No. 1*, 41 F.3d 1417, 1420 (10th Cir. 1994), citing *Carey* v. *Piphus*, 435 U.S. 247 (1978). Here, there was sufficient corroboration upon which the jury could base its awards for emotional distress.

The variance in amounts awarded to plaintiffs is troubling. If, under the evidence, the individual plaintiffs' recovery is limited to damages attributable to emotional distress stemming from being called a crook or fraud, it is difficult to justify the inconsistency in the damage awards. The jury awarded Mr. Parkhurst $250,000 and Mr. Evans $10,000, with the other plaintiffs somewhere in between. It is possible, and perhaps likely, that Mr. Parkhurst's award included some recovery for the lost value of his business, an inappropriate basis for relief, as just noted.[28] However, as some of the other individual plaintiffs' damage awards cannot be similarly explained, the Court is reluctant to speculate as to the specific bases for the jury's determinations. Apart from noting the concern and, as the damages were given to compensate for losses

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the economic losses or lost profits of the corporation he or she owned.

[28] Mr. Parkhurst made a somewhat tentative estimate of the value of his business, owned jointly by him and Mrs. Parkhurst, of $500,000. Transcript, p. 1000. The jury's award to Mr. and Mrs. Parkhurst together equaled $500,000.

not susceptible of precise calculation, the Court concludes the variances are not so excessive as to invalidate the awards.

Based on the foregoing, the Court concludes defendant Fogarty's motion for judgment as a matter of law should be granted as to Mr. Holcomb and Mrs. Parkhurst, but denied as to the claims of the other individual plaintiffs.

B. Defendant Fogarty's Rule 50 motion - corporate plaintiffs' claims

The jury verdict in favor of the corporate plaintiffs comprised the bulk of the recovery against defendant Fogarty. To the extent the corporate plaintiffs rely on the same factual circumstances as the individual plaintiffs to establish Fogarty retaliated against them, the analysis applied to the individual plaintiffs' claims also applies to the corporate claims. What distinguishes the corporate claims is the corporate plaintiffs' reliance on "disparity" evidence.

The "disparity" evidence — evidence that the average reimbursement per unit of service was lower for the corporate plaintiffs than for other private providers — is central to plaintiffs' claims in two ways. First, plaintiffs relied on this evidence to show retaliation, viewing it as the "smoking gun." They maintain they were treated differently from other similarly situated private providers due to Fogarty's actions. Second, they used the evidence to establish the amount of their damages. The Court concludes the "disparity" evidence ultimately fails to aid the plaintiffs on either issue.

Broadly summarized, the "disparity" evidence arises from this background. Over several years in the late 1990's, Oklahoma experienced substantial increases in the cost of mental health services provided by private providers and paid for by Medicaid.[29] The evidence indicated the State attempted to control these increases and manage the resources allocated to this area of health care by establishing a system of prior review and authorization for mental health services. OHCA engaged the Oklahoma Foundation for Medical Quality ("OFMQ") as a third party gatekeeper to perform this function. An approved provider would prepare a proposed treatment plan for each of its patients or clients and would submit that to OFMQ. All private providers in Oklahoma were required to get prior authorization from OFMQ as a precondition to reimbursement for services rendered.

The treatment plan would identify the various types of services sought to be provided to a particular client and the number of units of such service. Applying certain criteria, which included the maximum numbers of units allowed for each level of care, OFMQ would then approve, reduce or deny the provider's request for approval of the units set out in the treatment plan.[30] Once approval from OFMQ

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[29] All private providers approved to render services to Medicaid patients did so pursuant to a contract between the provider and OHCA.

[30] In general, the criteria identified different levels of care (I to IV), depending on the type and severity of the mental or behavioral condition. Plaintiffs disputed whether the criteria really constituted "medical necessity criteria" or were too subjective. However, there was no dispute that the criteria (...continued)

was obtained, the provider rendered the services and then would seek reimbursement from OHCA for them.

The reimbursement amount depended on the type of service provided. Services included, among others, group therapy, family therapy, individual therapy, and psychosocial rehabilitative services. Employing a relatively complex system of weighting and "relative value units," reimbursement rates were assigned to each type of service. Certain services, such as group therapy sessions, had a low reimbursement rate per unit. Others, such as individual therapy, had a much higher unit rate. Consequently, a treatment plan might include a range of potential services.

During most of the relevant time period, Unisys, a third party contractor, handled the mechanics of paying the providers and maintaining the payment records. Plaintiffs' disparity evidence consisted of information derived from Unisys' records and reports. Under the system used by OHCA and Unisys, each provider and each facility was assigned a "J" number, making it possible to separately track reimbursements to multiple facilities of the same corporate provider.[31] From the reports it was

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were, in general, applicable to all providers seeking authorization.

[31] The "J" numbers for the various providers were: Southeast Oklahoma Family Services, J7315629501 (Transcript, p. 641); Morning Star, J7315097311 (Transcript, p. 1199); JCH, Inc., J7314898115 (Transcript, p. 1183); Rustling Winds, J7315561381 (Transcript, p. 59); Serenity Springs, J7315561381 (Transcript, p. 1068); Diversified Family Services, (...continued)

possible to determine the number of units requested and the amounts paid to each provider. From that information the average reimbursement per unit that a particular provider or facility received could be derived.

Plaintiff's expert witness, Mr. McDaniel, prepared various summaries of the information in the Unisys records.[32] He prepared monthly summaries for each of 25 months, showing the number of units, the amounts received, and the amount received per unit for each plaintiff and certain others originally in the plaintiff group. He performed the same calculations for each community mental health center ("CMHC"). He also provided totals, though not by individual provider, for all other private providers.[33] McDaniel's calculations indicated that for the 48 month period included in his analysis,[34] the average reimbursement per unit for the plaintiffs (or what plaintiffs termed the "politically active" group of providers) was $8.65, for CMHC's was $13.02, and for all other private providers was $18.13.[35] Plaintiffs maintain this

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J7314961344 (Transcript, p. 981). The last four digits of each J number identify the provider, while the other digits identify the particular facility.

[32] McDaniel reviewed 25 months of Unisys' records covering, with some gaps, the period from July 1999, to February, 2002.

[33] Plaintiffs' Exhibits 61.1-61.25.

[34] His analysis extrapolated the 25 months results over a longer time period, including months for which no records were available.

[35] Plaintiffs' Exhibit 61.27 is a chart showing these amounts. See also Transcript, p. 1348 (McDaniel testimony).

difference establishes Fogarty retaliated against them by causing OFMQ to reduce the number and type of units it approved for them as compared to other providers.

For a number of reasons, the Court finds the "disparity" evidence was insufficient to support an inference that Fogarty retaliated against the plaintiffs.[36] First, as has been discussed in conjunction with the claims of the individual plaintiffs, there was no direct evidence suggesting Fogarty had anything to do with causing OFMQ to approve or disapprove a particular request or requests by these or any other providers. Thus, even if the disparity evidence was sufficient to prove that someone treated them unfairly, it does not support the further inference that Fogarty was the person doing so.

Second, there was no evidence that this "disparity" in reimbursement levels occurred after and because of plaintiffs' protected First Amendment activities. For the "disparity" evidence to suggest retaliation for plaintiffs' political activity, the plaintiffs would have to show that the disparity did

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[36] In the order granting defendants summary judgment on the equal protection claims of Evans and Southeastern Oklahoma Family Services, Inc., the Court concluded the disparity data as to reimbursement rates failed to establish the existence of a factual issue which might make out an equal protection violation. Order, April 16, 2003. Similarly, in the order disposing of the Rule 50 motions after the first trial, the Court noted: "In short, if the only adverse or retaliatory actions asserted by plaintiffs were based on "disparities" in reimbursement amounts, the Court would enter judgment as a matter of law for defendants." Order, July 9, 2003, p. 8.

not exist before the protected conduct. However, there was nothing in the evidence from which the jury could have drawn that conclusion. If anything, the evidence suggested the contrary. Disparities of various sorts existed before plaintiffs organized their provider association and became politically active.[37] The testimony indicated plaintiffs' organization and political activities were designed from the beginning to achieve what they saw as fair treatment relative to other providers and to "level the playing field." There was testimony from some of the plaintiffs that their requests for approval of units began being cut back in the period after they formed their association. However, there was no evidence that other providers did not experience similar cuts during that period.[38] The result is that, without some kind of comparative data for the period prior to the protected activity, disparity evidence does not show retaliation even it was otherwise wrongful or unfair to plaintiffs.

Another more fundamental problem exists, however, with respect to the disparity evidence. Proof of differences in average reimbursements per unit may suggest retaliation through discriminatory treatment only if it is shown, or can be reasonably

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[37] *See* Plaintiffs' Exhibit 3.2, an October 8, 1998, letter from Nancy Graves (now plaintiff Nancy Thrift) to the governor, objecting to "great differences in the reimbursement rates of private and public facilities." The provider association was formed in late 1998.

[38] There was, on the other hand, evidence that OHCA, through OFMQ, was cutting units for all providers at various times due to budget constraints.

inferred, that plaintiffs were similarly situated with other private providers. In this case, that would require a showing of at least the following: (a) that plaintiffs' patient populations were the same in terms of mental health conditions requiring treatment; (b) that the incidence of those conditions within each patient group — the mix of patients — was the same as for the groups treated by other providers; (c) that the treatment plans submitted by plaintiffs to OFMQ contemplated the provision of the same services being rendered by other providers; and (d) that, in general, the proportion of "high cost" versus "low cost" services — the mix of services — requested by plaintiffs was the same as that requested by other providers. The Court concludes the proffered evidence failed to support the inference that the corporate plaintiffs were, in fact, similarly situated to the other mental health services providers.

The evidence reflected that, as of the year 2000, there were approximately 180 private providers providing services at approximately 330 sites around Oklahoma.[39] These providers were never specifically identified. Apart from the average unit reimbursement rate for these providers, none of the types of evidence just described, such as patient mix, that would demonstrate that these other private providers were similarly situated to the plaintiffs was offered. Some of the plaintiffs did give

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[39] Transcript, p. 955 (Fritz testimony). Mr. McDaniel, plaintiffs' expert, did not specify the number of other providers whose data he examined, but he did indicate the records were voluminous.

conclusory testimony as to the similarity of their populations or services rendered to those of other providers, based on providers they previously worked for or places they had visited. However, no plaintiff was in a position to determine the comparability of the broad group of private providers with which they compared themselves.[40]

Dr. William Schmid, one of plaintiffs' witnesses who had experience with a broader range of facilities, did testify that the types of clients would be similar between facilities and that the types of care provided for various conditions should be similar. He did not, however, testify that the particular percentage of patients with a particular illness would be similar from facility to facility. He also noted that considerations such as the age of the patient served would impact the services provided.[41]

A detailed examination of plaintiffs' disparity evidence illustrates why it will not support the

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[40] *See Woods* v. *National Medical Care, Inc.*, 2001 WL 1573574, at *4 (10th Cir. Dec. 11, 2001) (plaintiff's "conclusory statement that her new [employment] position was not comparable does not create a genuine issue of material fact"); *Bethley* v. *City of Spencer*, 37 F.3d 1509, 1994 WL 573765, at * 3 (10th Cir. Oct., 19, 1994) (expert's conclusory affidavit lacking in factual support failed to create an issue of fact in summary jury context); *Pendleton* v. *Conoco, Inc.*, 23 F.3d 281, 286 (10th Cir. 1994) (standard for Rule 50 motion "is identical to the standard for summary judgment under Rule 56"). *See generally United States* v. *Williams*, 212 F.3d 1305, 1301-10 & n.6 (D.C. Cir. 2000) (for lay opinion testimony to be admissible as rationally based on the witness' perception, a sufficient factual foundation must exist.)

[41] Transcript, pp. 857-64 (Schmid testimony).

inference – that they were just like all the other providers in the state and should therefore have been paid the same (on an average per unit basis) – that plaintiffs asked the jury to draw from it. To the contrary, plaintiffs' evidence, in the form of McDaniel's monthly summaries of the reimbursements received by plaintiffs and others, established rather clearly that the plaintiffs are not even like each other.

The monthly summaries, plaintiffs' exhibits 61.1 through 61.25, supplied an historical record of the reimbursements received, by facility, for each of the 25 months as to which records were available. Among other things, these exhibits showed that for roughly the two year period from August, 1999, through July, 2001, the Morningstar facility associated with "J" number J7315097311 had an average monthly reimbursement rate ranging from $22 to $28 per unit.[42] During the same time period, the Rustling Winds facility associated with "J" number J3314726373 had an average monthly reimbursement rate ranging from roughly $4 to $6 per unit.[43] Such differences, with rates at one facility exceeding the other by in excess of 400%, render unreasonable any inference that these two facilities were similarly situated.

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[42] One month in this period showed a rate of $10.73; all others are consistent with the indicated range.

[43] The ranges for other plaintiff providers were, for the most part, consistent over time for each provider and fell somewhere between the average rates indicated for the Morning Star and Rustling Winds facilities.

However, not only did the average unit reimbursement rate differ among the plaintiff providers, it varied among the multiple facilities operated by the same corporate plaintiff. For example, from February 2000 to February 2002,[44] the Rustling Winds facility associated with "J" number J3314726373. had an average monthly reimbursement rate of $4 to $6 per unit, while the Rustling Winds facility identified by "J" number J4314726373 had average reimbursements ranging from $10 to $27 per unit. The difference clearly does not support an inference that these two facilities were similarly situated in terms of populations, services rendered and the like.[45]

Other evidence offered by plaintiffs also undermined the reasonableness of inferring that they and all other providers were similarly situated. Mrs. Thrift testified the Rustling Winds facilities in McAlester and Poteau primarily served adults with serious and persistent mental illnesses,[46] while the Wilburton facility primarily served children and adolescents and provided family counseling services.

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[44] The time frame varies from the prior comparison because the referenced facilities were not all open at the same time.

[45] Disparities in the plaintiff providers' average reimbursement rates cannot be explained on the basis of OFMQ responding differently to their requests, as all plaintiffs testified that OFMQ reduced their requests for units by approximately 25-30%. See Transcript, pp. 1361-62 (McDaniel noting, in connection with one of his damages computations, his understanding of plaintiffs' testimony to be that they had all had their units reduced by approximately 25%).

[46] Transcript, pp. 234-35.

That testimony was consistent with and perhaps explains the substantially different per unit reimbursement rates of the various Rustling Winds facilities.

Another plaintiff, Mr. Wheeler, testified that the client population of his facility, Serenity Springs, was 99% children.[47] Yet most other plaintiffs testified that their facilities served a combination of adults and children. The evidence was undisputed that, at least at times, reimbursements differed depending on whether adults or children were being served.[48] The severity of the conditions being treated also greatly affected the level of reimbursement. The existence of such variables within the plaintiff group further illustrates that it could not be reasonably inferred, from the evidence offered at trial, that all other providers were similarly situated with plaintiffs.

McDaniel's monthly summaries also showed the average per unit reimbursements for CMHC's – the state owned or state contracted facilities that provided outpatient mental health services. The summaries reflected wide variances in their reimbursement rates, demonstrating that a particular CMHC facility is not like every other CMHC in terms of their patient populations, mix, etc.

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[47] Transcript, pp. 1068-69.

[48] The evidence indicated that in 1999, during a period of cost containment efforts by the legislature and OHCA, units for children were cut by 5%, while adult units were cut by 30%.

In short, given the undisputed evidence of differences between the plaintiffs, differences between multiple facilities of the same plaintiff, differences between the various CMHC's, and the like, the evidence plainly did not provide a nonspeculative basis for the inference plaintiffs asked the jury to draw – that plaintiffs were similarly situated with all other private providers in the State and were therefore entitled to the same average reimbursement.

Although perhaps unnecessary in light of the Court's ruling on the issue of Fogarty's liability to the corporate plaintiffs, some discussion of the damages sought by the corporate plaintiffs and awarded by the jury is appropriate. Even if the Court concluded the evidence supported a finding that Fogarty had retaliated against the corporate plaintiffs, the damage awards could not stand because of two substantial problems with the plaintiffs' lost profits computation.

The measure of damages for the corporate plaintiffs was their lost profits attributable to the alleged retaliation.[49] Plaintiffs offered no evidence from which the jury might have made a conventional assessment of lost profits, such as some computation of profit per unit multiplied by the number of units they claimed to have been wrongfully denied. Instead, plaintiffs relied on the same "disparity" evidence just discussed. That evidence described the difference between gross revenues the plaintiffs

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[49] Court's Instructions to the Jury, Damages – Corporate Plaintiffs, pp. 28-29.

actually received and the gross amounts they would have received if they had been paid the average unit reimbursement rate of other private providers.[50] Plaintiffs argued that this was the appropriate measure of their lost profits because they actually provided to their clients all the units of services for which they sought OFMQ's approval, regardless of whether OFMQ approved them for reimbursement.[51] Because they incurred the costs involved in generating the services, the plaintiffs contended they were entitled to the gross reimbursement amount.

Plaintiffs' position is contrary to the applicable legal standards. Plaintiffs are entitled to recover damages from defendant Fogarty only for harm he proximately caused.[52] In addition, the law requires a plaintiff to mitigate his or her damages.[53] The question raised by plaintiffs' theory of recovery boils down to this: what obligation did a plaintiff have, once it sought approval of a particular treatment plan from OFMQ and OFMQ either reduced the units of services approved or denied the request altogether? In the context of a claim against Fogarty, and absent a legal obligation to the

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[50] *See generally* Transcript, pp. 1354-58 (McDaniel testimony).

[51] All the plaintiffs testified to this general effect; there was no evidence to the contrary.

[52] Court's Instructions to the Jury, Essential Elements of Corporate Plaintiffs' First Amendment Claim under Section 1983, p. 18, fourth element.

[53] Court's Instructions to the Jury, Duty to Mitigate Damages, p. 26. Defendants bear the burden of proof as to mitigation of damages. Here, however, the application of the doctrine is based on the undisputed facts offered by plaintiffs.

contrary, a plaintiff's obligation at that point was to stop incurring additional costs and not incur the expense of providing the services. If, despite the lack of a legal obligation to do so, a plaintiff chose to go ahead and provide the services voluntarily on some sort of pro bono basis, the cost of its performance cannot be shifted to Fogarty as something he caused.

Hence the question becomes whether plaintiffs were legally obligated to provide the various services included in a treatment plan even though OFMQ had denied the prior authorization necessary for reimbursement. Plaintiffs maintained the Medicaid provider agreement they entered into required them to provide the services.[54] However, neither that contract nor other applicable law supports that position.

The contract provision plaintiffs rely on requires the outpatient health services provider "to comply with 42 U.S.C. §1396a(a)(25)(D) of the Medicaid Act, which prohibits a Medicaid provider from refusing to furnish services to an individual eligible to receive Medicaid compensable services because of a third party's potential liability for payment for the services." Plaintiff's Exhibit 59.6, Agreement between OHCA and Outpatient Behavioral Health Services Provider, Art. 4(c). This language does not require a provider to furnish Medicaid services to all

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[54] The interpretation of the provider contract presents a legal question, as does the nature of plaintiffs' legal obligations arising from the Medicaid statutes. The Court sustained objections to testimony from some of the plaintiffs when they attempted to give their interpretation of the provider contract.

eligible recipients regardless of whether OFMQ has authorized them.[55]

Similarly unsupportive are the provisions of the Medicaid Act the plaintiffs cited, 42 U.S.C. §1396a(a)(23)-(25),[56] and the reference in the meeting materials for the June, 1996, meeting of OHCA's Medical Advisory Committee to several provider requirements, including their obligation to "provid[e] services without regard to the patient's ability to pay." Plaintiff's Exhibit 42.5. Neither compel a provider to furnish services regardless of whether they are approved for reimbursement.

The decision to provide uncompensated services to others may have made good business sense for

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[55] In this context, OHCA is not a "third party" within the meaning of the contract.

[56] The "freedom of choice" provision of the Medicaid Act, § 1396a(a)(23), was discussed by the Second Circuit in *Catanzano by Catanzano* v. *Wing*, 103 F.3d 223, 231 (2nd Cir.1996). The court stated that under the provision " a Medicaid claimant may obtain services from any qualified provider 'who undertakes to provide him such services.' The federal regulations elaborate that 'a recipient may obtain Medicaid services from any [provider] that is ... [w]illing to furnish them to that particular recipient.' 42 C.F.R. § 431.51(b)(1)(i). The Health Care Financing Administration noted in its explanation of the 1991 amendments to this regulation that it 'added language to counteract a misunderstanding that has arisen in the past: freedom of choice does not obligate a Medicaid provider to furnish services to every recipient.... [A] recipient may seek to obtain services from any qualified provider, but the provider determines whether to furnish services to that particular recipient.' 56 Fed. Reg. 8835 (1991)." *Id.* at 231.

other reasons.[57] Helping others without compensation is no doubt laudable. For purposes of this case, however, the question is whether a legal basis existed for shifting to Fogarty the costs plaintiffs incurred by providing the unreimbursed services. None was shown. Plaintiffs cannot voluntarily provide services for which authorization had been denied and then shift the costs to Fogarty – he did not cause the costs to be incurred.[58]

The second significant problem with plaintiffs' damages theory, based on giving the corporate plaintiffs the same average reimbursement per unit as every other private provider, is that it results in a damages figure far greater than what could plausibly be attributed to any retaliation by Fogarty.

McDaniel first computed damages by determining the total number of units for which plaintiffs had been paid during the period for which records existed, extrapolating that figure to the 48 month period in issue,[59] and then multiplying the

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[57] One plaintiff testified the unapproved services were provided, at least in part, as a means of minimizing the risk of future lawsuits. Transcript, p. 50.

[58] To the contrary, at least insofar as allocation of the duties and burdens of this case was concerned, plaintiffs had a duty to mitigate damages resulting from any unfair treatment, rather than increase them.

[59] Defendants objected to the extrapolation of 25 months data over a 48 month period. Given the relative consistency of the average per unit reimbursement rate during the 25 months, the Court does not view the extrapolation as objectionable, though it likely presses the outer limits of what might be reasonably projected from the data.

adjusted number of units times the "disparity" in average unit reimbursement rates between the plaintiffs and other private providers.[60] Using this method, McDaniel calculated the corporate plaintiffs' damages to be $11,454,266.88. He then calculated interest on this amount at 7%, resulting in an additional $3,070,993.12, for a total of $14,525,260.

McDaniel also made a second calculation, taking into account the plaintiffs' testimony that the units they requested were generally reduced by about 25%.[61] He computed the dollar impact of that for each of the providers, in effect adding the amounts attributable to the 25% reduction, plus interest, to the totals the plaintiffs actually received. According to this calculation, but for the 25% cuts, the plaintiffs as a group would have been paid an additional $4,200,583.[62]

The second calculation — which added back the 25% allegedly cut from the authorization requests — would put the plaintiffs in the position they would have been in if their requests had been granted in full by OFMQ. The first calculation — which raised plaintiffs' reimbursement total based on the average per unit reimbursement rate for other private

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[60] Transcript, p. 1356 (McDaniel testimony). His data indicated the plaintiff providers had been compensated at an average per unit rate of $8.65, while the average for the other private providers was $18.13. McDaniel then multiplied the difference — $9.48 — times the plaintiff's total number of units.

[61] Transcript, pp. 1361-67 (McDaniel testimony).

[62] Transcript, pp. 1365-66 (McDaniel testimony). The transcript does not reflect the totals prior to the addition of interest.

providers — resulted in a damages award that was roughly $10,000,000 more than the reimbursement amount plaintiffs had actually sought from OFMQ. It is plainly unreasonable to suggest that Fogarty retaliated against plaintiffs by somehow failing to cause OFMQ and/or OHCA to pay them more than they even requested in the first place. It is apparent from the amount of damages awarded by the jury that they relied on McDaniel's first, excessive calculation.

Regardless, as the evidence was insufficient to establish that Fogarty retaliated against the corporate plaintiffs, the Court concludes Fogarty's motion for judgment as a matter of law must be sustained as to the corporate plaintiffs' claims.

C. Defendant Fritz's Rule 50 motion - Plaintiffs Holcomb and JCH, Inc.

The jury found in favor of defendant Fritz as to the claims of all plaintiffs except for Joel Holcomb and JCH, Inc., Holcomb's company, awarding $250,000 to Holcomb individually and $325,000 to JCH, Inc., plus a punitive damage award to JCH, Inc. of $7500. Some of the prior discussion pertaining to defendant Fogarty applies to the claims against Fritz. There was evidence Holcomb/JCH, Inc. engaged in protected First Amendment activity, although it was considerably more limited than that of the other plaintiffs.[63] Further, there was evidence

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[63] Holcomb was a member of the provider's association (Transcript, p. 1158). He spoke at an OHCA board meeting in January, 1999 (Transcript, p. 1159) and sent letters to his state legislators (Transcript, p.1159). However, there was no evidence (...continued)

from which the jury could have concluded that Holcomb and Fritz had disagreements and that she knew he was a member of the provider's association.[64] As with the claims against Fogarty, the critical question is whether there was evidence from which the jury could have reasonably concluded she took some adverse or retaliatory action against Holcomb or his company.

As there was no evidence suggesting that Holcomb lobbied at the State Capitol, he could not have been present at the meetings where some or all of the defendants allegedly described other plaintiffs as "crooks or frauds." Holcomb's claims against Fritz, therefore, cannot be sustained on the same basis as the individual plaintiffs' claims against Fogarty were.

Holcomb claims Fritz retaliated against him by: (1) causing OFMQ to cut back on the units approved for JCH, Inc. (and thus the reimbursements it could receive) and (2) causing CARF, the accrediting agency, to deny accreditation to JCH, Inc. However, that retaliation, if it occurred, was against JCH, Inc., the corporate plaintiff, not Holcomb individually. In the absence of any evidentiary basis for a finding that Fritz retaliated against Holcomb personally, the

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that he ever came to the State Capitol or participated in the lobbying activities there.

[64] They apparently took conflicting positions on some aspects of the licensing or staff certification requirements OHCA ultimately applied to providers. There also was testimony that Fogarty and Fritz laughed, rolled their eyes, and whispered during Holcomb's January 1999, presentation to the OHCA board. Transcript, p. 1160.

award in his favor cannot stand and Fritz's Rule 50 motion as to Holcomb's claim against her must be granted.

Much of the prior discussion pertaining to the corporate plaintiffs' claims against Fogarty applies equally to JCH, Inc.'s claim against Fritz. As with Fogarty, there was no evidence that Fritz told OFMQ to cut JCH Inc.'s approved units. There was no evidence that she told OFMQ to slow the processing of its requests or to take adverse action of any sort against JCH, Inc. There was no evidence that Fritz's actions caused or contributed to the "disparity" in reimbursements compared to other providers. Indeed, apart from whatever significance is appropriately given to the "disparity" evidence, there was no proof that JCH, Inc. was treated differently from other providers, by Fritz or anyone else.

As with the corporate claims against Fogarty, the issue becomes whether there was circumstantial evidence from which the jury could have reasonably concluded that Fritz somehow impacted JCH Inc.'s approved units or cash flow. It was established at trial that Fritz was a senior administrator with OHCA and her duties included dealing with OFMQ. She was the contract monitor for OHCA as to the behavioral health services portion of the OFMQ contract and could affect, at least in general, the overall level of units OFMQ approved. These circumstances, coupled with evidence as to disputes or disagreements between Holcomb & Fritz, are not enough to support an inference that Fritz in fact used her power or position to harm JCH, Inc.

The evidence relating to Fritz's role in the denial of accreditation to JCH, Inc. is similarly lacking.

Fritz was on the board of directors of CARF, the accrediting agency. The CARF representative testified that input from state regulators was considered in making accreditation decisions. However, there was no evidence that Fritz in fact made any recommendation as to JCH, Inc.[65] She had what Holcomb viewed as improper advance notice of JCH Inc.'s denial of accreditation. However, Holcomb testified that JCH, Inc. was required to obtain accreditation by July 1, 2001. He also indicated his conversation with Fritz, which reflected her knowledge of the denial,[66] occurred after that date, in mid-July 2001.[67] The fact that a state regulator would have that information in that sequence suggests nothing improper.

The evidence offered falls short of providing a basis upon which the jury could have reasonably concluded that Fritz intervened with CARF to deny JCH, Inc. its accreditation[68] or otherwise retaliated

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[65] Plaintiffs alluded to evidence of a telephone call the CARF reviewer made during the accreditation inspection of the JCH, Inc. facility, which left the reviewer shaken. Transcript, pp. 1164-65. Although plaintiffs suggested the call was to Fritz, nothing in the evidence supported that assumption or inference.

[66] Holcomb testified that the results were still preliminary in mid-July when he had his conversation with Fritz.

[67] Transcript, pp. 1178,1169.

[68] As to the CARF accreditation issue, it is highly questionable whether there was evidence from which the jury could have concluded Fritz had the intent or motive to harm JCH, Inc. JCH, Inc. was the only member of the provider group to be denied accreditation. All other plaintiffs, including several with far more extensive involvement in lobbying than Holcomb, were accredited by CARF. Evidence that Fritz rolled her eyes and laughed at Holcomb in a meeting two and a half years prior to (...continued)

against JCH, Inc. Fritz's motion for judgment as a matter of law on JCH Inc.'s claims, too, must be granted.

D. Defendant Brown's Rule 50 motion

The jury found in favor of defendant Brown on the claims of all individual plaintiffs except those of Mr. and Mrs. Thrift,[69] awarding them compensatory damages in the amount of $25,000 each and $500 each in punitive damages.[70] Again, the discussion with respect to the individual plaintiffs' claims against Fogarty, in particular the references to defamatory comments made about plaintiffs, applies to the claims against Brown. Most of her actions that plaintiffs objected to involved protected conduct of Brown. She, too, had First Amendment rights.[71]

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the CARF accreditation plainly does not support an inference that she retaliated against him. (January, 1999, meeting of the OHCA board, Transcript, p. 1159; JCH, Inc. closed in August, 2001, due, in part, to lack of accreditation, Transcript, p. 1156). See generally Conner v. Schmuck Markets, Inc., 121 F.3d 1390, 1395 (10th Cir. 1997) (in retaliatory discharge context, four month time lag between participation in protected activity and termination does not support an inference of causation).

[69] The Court previously granted Brown's Rule 50 motion as to the corporate plaintiffs' claims because there was no showing she had any role with respect to prior approvals through OFMQ or the reimbursements the corporations received.

[70] It is unclear from the evidence what bases the jury may have had for finding in favor of the Thrifts, but not the other plaintiffs.

[71] For example, Brown is alleged to have contacted legislators before and after the plaintiffs saw them, with the result that the legislators' attitudes toward plaintiffs changed. There was evidence she made various statements to plaintiffs urging them (...continued)

However, although a close question, the Court concludes there was sufficient evidence, viewing it in the light most favorable to the jury verdict, from which the jury could have concluded that Brown made defamatory comments about the Thrifts to legislators or others, under circumstances implying that some punishment, sanction or adverse regulatory action would imminently follow. Further, there was evidence from which the jury could have inferred that her actions were motivated by malice or ill will sufficient to justify an award of punitive damages.

SUMMARY

For the reasons set forth above, defendant Fogarty's motion for judgment as a matter of law is DENIED as to the claims of the individual plaintiffs other than Mrs. Parkhurst and Mr. Holcomb. His motion is GRANTED as to Mrs. Parkhurst, Mr. Holcomb and the claims of the corporate plaintiffs. Defendant Fritz's motion for judgment as a matter of law is GRANTED. Defendant Brown's motion is DENIED. Judgment will enter in accordance with the jury's verdict, as modified by this order.

IT IS SO ORDERED.

Dated this 23rd day of February, 2005.

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to abandon their efforts, as well as comments on a variety of issues and in various contexts.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

NO. CIV-01-0252-HE
(Consolidated Number)

ALFRED MILTON EVANS, ET AL.,

Plaintiffs,

v.

MIKE FOGARTY, ET AL.,

Defendants.

ORDER

Filed, Aug. 25, 2003

At the conclusion of the trial in this case, the jury returned a verdict in favor of all the plaintiffs and against defendants Fogarty, Fritz and Brown in their individual capacities. The cumulative total of all amounts awarded to the plaintiffs against these defendants was $33,095,000 in compensatory damages and an additional $1,350,000 in punitive damages. Following the Court's disposition of the defendants' Rule 50 motions,[1] judgment was entered

[1] Defendant Brown's Rule 50 motion was granted in part, resulting in a reduction of the jury's award as to her.

in favor of the various plaintiffs in amounts totaling $30,565,000 in compensatory damages and $1,300,000 in punitive damages.[2]

The defendants have now filed their respective motions renewing their motions for judgment as a matter of law or seeking, alternatively, a new trial, alteration or amendment of the judgment, remittitur, or other relief from the judgment. Plaintiffs have filed their combined response to the various motions.

Insofar as the defendants' motions seek entry of judgment as a matter of law, they will be **DENIED**. The parties provide no persuasive basis for altering the conclusions reached by the Court in connection with the earlier Rule 50 motions. Similarly, the Court **DENIES** any relief sought under Fed. R. Civ. P. 60, concluding the rule is inapplicable to the issues and circumstances presented here. The Court concludes, however, that the verdict returned by the jury in this case is unsupportable under the evidence and applicable law and must be set aside in its entirety. Defendants' motions for new trial will be **GRANTED**.

DISCUSSION

A jury's verdict is not to beset aside lightly. The jury's determination of the factual issues in a case is entitled to substantial deference – a deference grounded in the constitutional right to jury trial.[3] At the same time, a federal trial judge's power to set

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[2] Judgment entered July 9, 2003.

[3] U.S. Const. amend. VII.

aside a jury verdict, in a proper case, is well-established. Fed. R.Civ.P. 59. That power is properly viewed not as being contrary to the right to trial by jury but rather as an important safeguard of that right.[4] Where a trial judge believes the jury's verdict to be contrary to the weight of evidence, or that the damages awarded by the jury are excessive, or that the ends of justice otherwise require it, the verdict may be set aside and a new trial ordered. *Gasperini* v. *Center for Humanities*, 518 U.S. 415 (1996); *Holmes* v. *Wack*, 464 F.2d 86 (10th Cir. 1972).

Here, although reluctant to disturb the jury's determination and mindful of the significant additional burden to the parties from further proceedings in this court, the Court is left with the definite and firm conviction that the jury's verdict and determination is in error, is not supported by the evidence, and must be overturned.

A variety of factors enter into the Court's determination. First, as noted in the Court's July 9, 2003, order, the evidence tending to show retaliation against the plaintiffs by any of the defendants was extraordinarily thin. Reliance on circumstantial evidence is an appropriate means of proof and, in some cases, the only way to prove certain facts. Here, however, much of the evidence offered to establish retaliatory Activity by defendant Fogarty,

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[4] *Holmes* v. *Wack*, 464 F.2d 86, 88 (10th Cir. 1972) quoting with approval from *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941): "The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right."

Fritz and Brown bordered on pure speculation and, in some instances, was based on little more than proof that the particular defendant was a supervisor of some activity at OHCA. An individual defendant's liability in a § 1983 action may not be based on the doctrine of respondeat superior, but must be based on that individual's personal participation in the wrongful activity.[5] While the evidence here was sufficient to raise a jury question as to the potential liability of these defendants, that evidence was far from compelling.

The sufficiency of the evidence to support the damages awarded in this case is also central to the Court's conclusion that a new trial must be ordered. The jury awarded compensatory damages to the corporate plaintiffs totaling $24,000,000 and to the individual plaintiffs totaling $9,095,000. The only basis upon which the jury could have awarded damages of that magnitude to the corporate plaintiffs was by accepting plaintiffs' arguments as to the impact of the claimed disparity in reimbursement rates. Certain of the Court's reservations about the impact of that evidence were addressed in the July 9 order and will not be repeated here. Certain other factors, related to the damages based on the "disparity" but not addressed in the prior order, are also of concern to the Court.[6]

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[5] In the case of a supervisor, liability may also be based on the supervisor's actual knowledge of and acquiescence in the constitutional violation.

[6] The Court's earlier comments addressed the sufficiency of the "disparity" evidence to show retaliation by the defendants. The Court's Rule 50 ruling did not address issues related to whether (...continued)

As the Court's instructions made clear,[7] each plaintiff had the burden of establishing not only that plaintiff's entitlement to relief but also the amount of damages that plaintiff had suffered. Here, plaintiffs made no effort to quantify the economic losses of each corporate plaintiff. Rather, plaintiffs sought to prove the economic losses of their plaintiff group and then, in closing argument, invited the jury to allocate the damages in the proportion of one fourth to Southeastern Oklahoma Family Services, one fourth to Rustling Winds, and one fourth to Morning Star, with the balance split between the other corporate plaintiffs. Transcript, pp. 1087-8. The jury obliged with precisely the split requested by counsel.[8] There was no basis in the evidence for the jury to allocate damages in that fashion between the corporate plaintiffs. The amount of damages awarded to each particular corporate plaintiff is thus without sufficient support in the evidence.

The jury's formulaic allocation of damages between each of the defendants was also troublesome. As to the recovery of each plaintiff but

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the evidence supported the particular damage determinations made by the jury.

[7] *See* Court's Instruction to the Jury, pp. 7 and 23. The Court and counsel also discussed at length, in the context of determining an appropriate verdict for, the distinct and separate determination to be made as to each plaintiff. Transcript, pp. 940-2.

[8] SOFS, Morning Star and Rustling Winds were each awarded at total of $6,000,000. The other corporate plaintiffs, JCH Inc., Serenity Springs and Diversified Family Services, were awarded $2,000,000 each.

one, the verdict allocated the damages among all of the defendants in precisely the same ratio, with Mr. Fogarty's liability set at a given level, Ms. Fritz's liability set at half of Mr. Fogarty's, and Ms. Brown's liability set at one sixth of Mr. Fogarty's. While such an approach is not conclusive proof of an improper process being used by the jury, it at least calls into question whether the jury did make the individualized determinations of liability and damages required by the Court's instructions.[9]

The sufficiency of the evidence to support the verdict in favor of the corporate plaintiffs is lacking in another respect. The appropriate measure of damages in this case was the lost profits – not lost gross revenues – of the plaintiffs due to defendants' alleged retaliatory actions. Court's Instruction to the Jury, pp. 23-4. Plaintiffs' "disparity" evidence, to the extent that it proved anything, showed the loss in gross revenues the plaintiffs arguably had from the alleged differential treatment. It plainly did *not* establish, in and of itself, the amount of plaintiffs' lost profits. It was undisputed that the reimbursement rates for particular mental health services varied based on the type of service provided. Services to which a higher reimbursement rate applied, such as individual therapy, tended to involve a greater, more intensive level of staff

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[9] Contrary to plaintiffs' suggestion, the Court does not view the liability of these defendants as being joint and several. This case does not involve the sort of concurrent violation and non-apportionable injury as would warrant the imposition of joint and several liability. *See Northington* v. *Marin*, 102 F.3d 1564 (10th Cir. 1996).

support than did the services to which a lower reimbursement rate applied. Services such as group counseling, which might be provided to a dozen or more participants at once, required less staff support to provider per unit. Using plaintiffs' "disparity" calculation as the basis for lost profits essentially asked the jury to assume that all the additional services necessary to earn the higher reimbursement amount paid to other private providers could have been provided by plaintiffs *without additional costs to them*. Such an assumption is both implausible on its face and unsupported by the evidence in this case.

In addition to the damages awarded to the corporate plaintiffs, the jury granted substantial awards to the individual plaintiffs as well, with Mr. and Mrs. Majors receiving compensatory damage awards totaling $2.0 million, Mr. and Mrs. Thrift receiving $3.0 million, Mr. and Mrs. Parkhurst receiving $2.0 million, and other individual plaintiffs receiving lesser, though still substantial, amounts."[10] The damages awarded to the individual plaintiffs, being based largely, if not exclusively, on recovery for emotional or mental anguish,[11] are plainly excessive. In making that determination, the Court has considered both whether there was substantial evidence to support the award and whether the award is "so excessive ... as to shock the judicial

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[10] The *lowest* compensatory damage award to an individual plaintiff was to Mr. Wheeler, in the amount of $295,000.

[11] See Court's Instruction to the Jury, p. 23. The abstract value of the constitutional right involved is not an element of damages. *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299 (1986).

conscience and raise an irresistible inference that passion, prejudice or another improper cause invaded the trial . . . ." *Wulf* v. *City of Wichita*, 883 F.2d 842, 874-5 (10th Cir. 1989) (quoting *Foster* v. *MCI Telecommunications Corp.*, 773 F.2d 1116, 1121 (10th Cir. 1985)). There is no mechanical formula for determining when damages are so excessive as to meet the "shock the conscience" test, but awards given in other, similar cases may be considered in making the determination. *See Wulf*, 883 F.2d at 875.

Wulf itself is particularly instructive here, as it involved a First Amendment retaliation claim asserted by a policeman against the police chief. Considering all the circumstances present in that case, as well as similar cases, the Tenth Circuit concluded an award of $250,000 for mental anguish and distress was "clearly excessive" and remanded the case for reconsideration of the damages issue with instructions that the mental distress damages *not exceed* $50,000. Relying on *Wulf*, numerous other courts have reduced or eliminated emotional distress or mental anguish recoveries, and appear to have sometimes used the *Wulf* amount of $50,000 as a guidepost. *See Hughes* v. *Regents of the Univ. of Colorado*, 967 F.Supp. 431, 438 (D.Colo. 1996) (*see also* cases cited therein at 438-39); *Powell* v. *COBE Laboratories, Inc.*, 208 F.3d 227, 2000 WL 235241 (10th Cir. March 2, 2000) (affirming trial court's reduction of damages to $50,000). The majority of the cases where this issue has arisen appear to be Title VII or other employment-related cases and thus are not directly comparable to this case – a First Amendment retaliation case involving conduct

stretching over several years and other relatively unique circumstances.[12] Nonetheless, the Court concludes that, even after taking the type of case and particular circumstances into account, the awards to the individual plaintiffs here were plainly excessive.

Defendants urge various theories as to why the jury reached the verdict that it did, including allegedly prejudicial references to controversial legislators or Health Department personnel. They also refer to the potential impact of Judge West's prior order being submitted to the jury. None of the specific grounds tendered by defendants are particularly persuasive. The references to particular legislators were relevant, given the context of the meetings which were referred to in this case.[13] The references to Health Department personnel (Mr. Van Meter or those related to him) were so oblique and limited as to make it unlikely they had any impact on the jury. As noted in the Court's July 9 order, the circumstances surrounding the admission of Judge West's order, coupled with the extraordinary steps taken by the Court on its own motion to address the potential prejudicial impact, render defendants' present reliance on the impact of the order unpersuasive. Ultimately, however, the Court concludes it is unnecessary to determine or speculate

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[12] This case is, however, similar to the cited cases in that the evidence of emotional distress was virtually all in the form of self-descriptions of stress and turmoil felt by the particular plaintiff (or his/her spouse).

[13] The Court has not exhaustively reviewed the record with this issue in mind, but does not recall a timely objection having been made to admission of testimony as to former Senator Stipe.

as to what factor or factors may have caused the jury to return the verdict that it did. For the reasons discussed above, the Court concludes the nature and amount of the verdict is sufficient to compel the conclusion that it must be overturned.

The Court has considered whether, rather than ordering a new trial, remittitur should be ordered in some amount. Such an approach is appropriate in many cases, but the Court concludes it is not appropriate here. Partly that is due to the Court's skepticism as to the propriety of a finding of liability against the defendants on the evidence presented. Partly it is due to the fact that establishing any lesser amount of damage would be purely arbitrary on the Court's part, there being no apparent basis in the evidence for setting some lesser amount of damages.

As noted above, the Court orders a new trial with considerable reluctance. Any jury verdict is entitled to substantial deference from the Court and should be set aside only where the need to do so is clear. Further, the Court understands the considerable disruption, financial toll, and other burdens on the parties that necessarily attend lengthy, hard fought litigation like that involved here. Nonetheless, a new tri it is necessary and appropriate under the circumstances of this case.

Accordingly, the Court **ORDERS** as follows:

1. Defendants' motions for new trial are **GRANTED** and the judgment entered July 9, 2003, is **VACATED**. Defendants' renewed motions for judgment as a matter of law are **DENIED**, as are

their motions insofar as they seek remittitur or other alteration or amendment of the judgment.

2. The Court will, in due course and by separate order, set this case for further settlement conference before Magistrate Judge Purcell. If the case is not resolved through that process, or otherwise by the parties, the Court will, at the appropriate time, set a further status conference for consideration of scheduling and other issues as may be necessary to prepare the case for retrial.

3. The motions of defendants Fogarty, Fritz and Brown for leave to file reply briefs [Documents 279, 280, and 276, respectively] are **STRICKEN as MOOT**. Similarly, plaintiffs' motion for award of attorneys fees [Document 265] and plaintiffs' bill of costs are **STRICKEN as MOOT**.

IT IS SO ORDERED.

Dated this 25th day August, 2003.

/s/

JOE HEATON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-01-0252-W

ALFRED MILTON EVANS, Individual, et al.,

Plaintiffs,

v.

MIKE FOGARTY, et al.,

Defendants.

ORDER

Filed, Aug. 14, 2001

Introduction:

Before the Court is the Defendants' Motion to Dismiss filed on April 4, 2001. Plaintiffs oppose the motion and filed a response on May 25, 2001. Upon review of the motion, the Court called for supplemental briefs on discrete issues. Plaintiffs filed their supplemental brief on July 23, 2001. Defendants filed a supplemental brief in their official capacities on July 23, 2001 and in their individual capacities on July 30, 2001. The Court considers all these briefs in deciding the motion to dismiss.

Background:

This case arises out of dealings between the Oklahoma Health Care Authority ("HCA") and plaintiffs Alfred Milton Evans ("Evans") and Southeastern Oklahoma Family Services ("SOFS"). Although he is employed in a consulting capacity, Evans apparently operates SOFS which provides mental health services in Southeast Oklahoma, Evans contends that as a result of his lobbying efforts on behalf of the mentally ill, the HCA retaliated against him personally and against SOFS as an entity. Evan alleges that this retaliation included unjustified delays in processing records requests, harassing audits, and termination of SOFS' Medicaid provider agreement. In response to these alleged wrongs, Evans and SOFS joined with certain SOFS patients ("patient plaintiffs") and filed this suit in January, 2001.

In early February, 2001, this Court held a hearing on a preliminary injunction motion filed by plaintiffs. After weighing the evidence before it, this Court ordered HCA to restore SOFS to the automatic reimbursement procedure that SOFS argued was essential to its continued existence. Following the granting of the preliminary injunction, plaintiffs filed a First Amended Complaint ("Complaint") in March 2001. The Complaint asserts eight causes of action: 1) violation of SOFS and Evans' First Amendment rights, 2) violation of the patients' First Amendment rights, 3) violation of SOFS and Evans' due process rights for deprivation of property, 4) violation of SOFS and Evans' due process rights for deprivation of liberty, 5) violation of the Medicaid Act's requirements of reasonable and adequate

reimbursement, 6) violation of the Medicaid Act's requirements of reasonable access and adequate quality, 7) violation of the Medicaid Act's amount, duration, and scope of services requirements, and 8) violation of 42 U. S.C. § 6009 and the Developmental Disabilities Assistance and Bill of Rights Act of 2000.

Defendants' motion to dismiss contains ten propositions; each proposition addresses one or more of the counts listed in the Complaint. Many of the issues raised by the motion to dismiss are complex and address one or more counts of the Complaint. In addition, analysis is further complicated by the fact that not all counts are asserted by all plaintiffs. In an effort to address all issues, the Court will analyze each proposition raised in defendants' motion to dismiss in turn; the appropriate counts and plaintiffs will be examined in the relevant portions of the analysis.

Legal Standard:

While not specifically stated, it appears that all of defendants' arguments are made pursuant to FED.R.Civ.P. 12(b)(6). When reviewing a Rule 12(b)(6) motion, a court must take all of the allegations in the complaint to be true, view them in the light most favorable to the plaintiffs, and draw all inferences in their favor. *Ramirez* v. *Oklahoma Department of Mental Health*, 41 F.3d 584, 586 (10th Cir. 1994). Granting dismissal under Rule 12(b)(6) is a harsh remedy and is generally disfavored. *Id.* However, if the allegations in the complaint clearly do not support a claim, that claim should be dismissed.

Analysis:

Proposition 1- Dismissal of Defendants in their Official Capacity

Defendants first argue that the case should be dismissed with respect to the defendants in their official capacities because the Eleventh Amendment bars suits, other than those for prospective injunctive relief, against state officials.

Plaintiffs have brought causes of action under 42 U. S.C. § 1983. Section 1983 does not create any substantive rights, but serves only as "a remedy for violations of rights secured by federal statutory and constitutional law." *Trujillo* v. *Grand Junction Regional Center*, 928 F.2d 973, 977 (10th Cir. 1991).

The State of Oklahoma and the HCA enjoy Eleventh Amendment sovereign immunity from suit and may not be sued under § 1983. *Kentucky* v. *Graham*, 473 U.S. 159 (1985)(holding that States may assert sovereign immunity in § 1983 actions); *see also Will* v. *Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989)(holding neither a state nor its officials acting in their official capacity are "persons" within the meaning of § 1983). Section 1983 was not intended to abrogate a State's Eleventh Amendment immunity. *Quern* v. *Jordan*, 440 U.S. 332 (1979). Therefore, relief cannot be had against the State of Oklahoma or the HCA under § 1983.

The only manner of obtaining relief against the HCA in this case is to sue the officers and board members of the HCA in their official capacities. Because "official-capacity actions for prospective injunctive relief are not treated as actions against

the State," Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985); *see also Ex parte Young*, 209 U.S. 123, 159-60 (1908), plaintiffs, by naming the officers and board members of the HCA in their official capacities, may be able to obtain prospective injunctive relief in this case.

Plaintiffs' argument that monetary relief may be had against state actors, in their official capacities, is unpersuasive. The cases cited by plaintiffs in making their argument are inapplicable for two reasons. First, even though monetary damages may be recovered from municipal entities, *Monell* v. *Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978), monetary damages are not available from the state. *See Kentucky* v. *Graham*, 473 U.S. 159 (1985). Therefore, the cases cited by plaintiffs allowing monetary recovery from municipalities (and school boards) are inapplicable to the present case. Second, plaintiffs misinterpret the primary case upon which they rely. Plaintiffs reliance upon *Smith* v. *Losee*, 485 F.2d 334 (10th Cir. 1973), is misplaced. In *Smith*, the court analyzed the issue of official immunity and found that certain individuals were not shielded from liability. More recent caselaw has developed the distinction between individual and official capacity defendants. It is well established that a judgment against an official in his official capacity is the same as a judgment against the public entity which he represents. *Brandon* v. *Holt*, 469 U.S. 464, 471-72 (1985). A suit against the HCA officers and board members, in their official capacities, is not a suit against the individuals, but is a suit against the state. Defendants in their individual capacities may still be liable for monetary

damages. Because the applicable caselaw clearly holds that monetary damages may not be had against official capacity defendants, the Court finds that the Complaint, to the extent it seeks monetary damages from the official capacity defendants, should be dismissed.

Proposition II- Dismissal of Counsel I, II, and IV for Failure to Allege Individual Participation

Defendants next seek to dismiss counts I, II, and IV of the Complaint for failure to assert that defendants individually participated in the alleged retaliation scheme. It is clear that a civil rights complaint must allege individual participation by the defendants. *Bennett* v. *Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976) (personal participation is an essential allegation in a § 1983 claim). Therefore, in order to state a claim, plaintiffs need to allege that HCA officers and board members individually participated in the First Amendment retaliation.

The Complaint sets forth the facts which give rise to the present suit. Plaintiffs allege with some particularity that defendants took actions to wrongfully terminate the SOFS Medicaid provider agreement, ordered harassing audits, and participated in delaying the processing of an open records request. The Court finds that when liberally construing the Complaint, as it must on a motion to dismiss, plaintiffs have asserted their causes of action with sufficient particularity. Therefore, the Court denies the motion to dismiss counts I, II, and IV for failure to assert individual participation by the defendants.

Proposition III - Dismissal based on Qualified Immunity

Defendants next assert the defense of qualified immunity for defendants Fogarty, Fritz, Mitchell, and Brown. Qualified immunity is an immunity from suit rather than a mere defense to liability. *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991). In the Tenth Circuit, plaintiffs need no longer meet a heightened pleading standard with respect to overcoming qualified immunity. *Currier* v. *Doran*, 242 F.3d 905, 916 (10th Cir. 2001). When analyzing qualified immunity in the context of a motion to dismiss, the Court must construe the allegations in the complaint and any reasonable inferences to be drawn from them, in favor of plaintiff. *Id* at 917. As a practical matter, this means the Court must assume that SOFS' Medicaid provider agreement was terminated as a result of plaintiffs' exercise of First Amendment Rights. As a preliminary matter, the Court also notes that because SOFS' relationship with the State is analogous to that of an independent contractor, SOFS may be treated like an employee for the purposes of First Amendment analysis. Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668 (1996).

When addressing qualified immunity, the Court must first assess whether the plaintiffs have asserted a violation of a constitutional right. If so, the Court must address whether the constitutional right was clearly established so that reasonable officials would have understood that their conduct violated that right. *Dill* v. *City of Edmond*, 155 F.3d 1193, 1204 (10th Cir. 1998). The Court takes each of these steps in turn.

In the context of First Amendment rights, the Court must apply the four-step analysis derived from *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), to determine whether a constitutional violation has been asserted. Pickering requires the Court to first determine whether plaintiffs' speech involved a matter of public concern. If so, the Court must balance the plaintiffs' interest in commenting upon matters against the interests of the state. If this balance tips in favor of the plaintiffs, they must then show that their speech was a substantial factor in the supposed retaliation. Finally, if plaintiffs make all these showings, defendants may demonstrate that they would have taken the same actions even in the absence of protected speech. *Dill*, 155 F.3d at 1202. The first two steps are legal questions while the last two concern causation and involve questions of fact. *Id.*

In resolving the first step, the Court must determine if plaintiffs' speech involved a matter of public concern. The Complaint asserts that plaintiffs lobbied the legislature on issues regarding the operation of the Oklahoma Medicaid system. When viewing the Complaint in the light most favorable to the plaintiffs, the Court must find that plaintiffs' speech involved a matter of public concern and that the first step of the *Pickering* test supports plaintiffs' position.

The second step of the *Pickering* test requires the Court to balance the interests of the plaintiffs' in commenting upon the Medicaid system against the state's interests. In the present case, the State does not assert that any State interest outweighed the plaintiffs' interest in free speech. Therefore, the

second step of the *Pickering* test also supports plaintiffs' position.

As stated above, the third and fourth steps of the *Pickering* test involve questions of fact. On a motion to dismiss, these must be resolved in favor of plaintiffs. Therefore, the Court finds that because, at this stage of the litigation, all of the *Pickering* factors support plaintiffs' position, plaintiffs have alleged a constitutional violation.

Having established that the plaintiffs have alleged the violation of a constitutional right, the Court must still determine whether that right was clearly established so that reasonable officials would understand their conduct violated that right. For the law to be clearly established, the Tenth Circuit has stated that there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established law from other courts must have found the law to be as the plaintiff maintains. *Medina* v. *City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992).

When the Pickering balance test is involved, the law is less likely to be clearly established than in other cases. *Dill*, 155 F.3d at 1204 (citing *Melton* v. *City of Oklahoma City*, 879 F.2d 706, 728 (10th Cir. 1989)). However, as previously stated, a court must draw all reasonable inferences in favor of the plaintiffs when deciding a motion to dismiss. Plaintiffs argue that even when the *Pickering* test is applied, the right against retaliation for exercise of First Amendment rights was clearly established at the time of defendants' actions. To support their argument, plaintiffs cite *Bisbee* v. *Bey*, 39 F.3d 1096 (10th Cir. 1994) and *Patrick* v. *Miller*, 953 F.2d 1240

(10th Cir. 1992). Both of these cases denied qualified immunity in the context of First Amendment retaliation. When taking all facts in the light most favorable to the plaintiffs, the Court finds that the law on the issue of First Amendment retaliation was clearly established. Therefore, the Court finds that, at this stage of the litigation, the Complaint may not be dismissed as to defendants Fogarty, Fritz, Mitchell and Brown based on their assertion of qualified immunity.

Proposition IV – Burford Abstention

Defendants next assert that the Court should abstain from deciding counts II, VI, VII, and VIII of the Complaint. Defendants base their argument on the case of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). In *Burford*, the Supreme Court found federal court abstention to be appropriate when dealing with complex state regulatory schemes. Defendants cite *Osteopathic Hospital Founders Association, Inc.* v. *Splinter*, 955 F.Supp. 1351 (N.D. Okla. 1996), for the proposition that federal courts should abstain in Medicaid disputes. The *Osteopathic Hospital* court chose to abstain in a dispute involving adequate reimbursement rates under the Boren Amendment, 42 U.S.C. § 1396a(a)(13).

The Court finds that *Osteopathic Hospital* is not directly applicable to the facts in this case for a number of reasons. First, the *Osteopathic Hospital* court took care to note that the dispute in that case did not involve an allegation that the State was systematically denying adequate reimbursement to Medicaid providers; the reimbursements to only one

provider were at issue. *Osteopathic Hospital*, 955 F.Supp. at 1360. Counts II, VI, VII, and VIII of the Complaint all allege systematic violations of the federal Medicaid provisions. Count II alleges a systematic denial of the patient plaintiffs' right to associate, Count VI alleges a systematic denial of the patient plaintiffs' right to reasonable access and adequate quality of care, Count VII alleges a systematic denial of patient plaintiffs' right to sufficient amount, duration and scope of services, and Count VIII alleges a systematic denial of patient plaintiffs' right to appropriate treatment, services, and habilitation. These allegations of systematic denials clearly differentiate the facts before this Court from the facts before the court in Osteopathic Hospital.

Second, it is clear that a number of federal courts have examined issues similar to the ones presented in this case. See generally *Herne* v. *Beye*, 57 F.3d 906 (10th Cir. 1995); *Smith* v. *Rasmussen*, 249 F.3d 755 (8th Cir. 2001); *Hope Medical Group for Women* v. *Edwards*, 63 F.3d 418 (5th Cir. 1995); *West Virginia University Hospitals, Inc.* v. *Casey*, 885 F.2d 11 (3rd Cir. 1989); *Evelyn V* v. *Kings County Hospital Center*, 819 F.Supp. 183 (E. D. N. Y. 1993). Because the issues presented in this case 1) appear to be distinguishable from those in Osteopathic Hospital, and 2) appear to involve an interpretation of federal law, the Court declines to dismiss counts II, VI, VII, and VIII under the *Burford* abstention doctrine.

Proposition V - Dismissal Based on Lack of Property Right

Count III of the Complaint asserts that Evans and SOFS have a property interest in the facilities operated by SOFS and in the continued receipt of Medicaid reimbursement monies. Evans and SOFS also assert that this property interest was taken without due process. Defendants contend that neither Evans nor SOFS has a constitutionally protected property interest in the continuation of the Medicaid reimbursements. To support their position, defendants cite *Geriatrics, Inc.* v. *Harris*, 640 F.2d 262 (10th Cir. 1981) and *Kelly Kare, Ltd* v. *O'Rourke*, 751 F.Supp. 1154 (S.D.N.Y. 1990). *In Geriatrics*, the Tenth Circuit held that the plaintiff nursing home did not have a protectable property interest in the continuation of its Medicaid contract. *Geriatrics*, 640 F.2d. at 265. The court found that the financial need of the nursing home was merely incidental to the purpose and design of the Medicaid program. *Id.* In *Kelly Kare*, the court held that a Medicaid provider did not have a due process property interest in continuation of its contract with the county. In analyzing the issues, the court stated that "if all public contracts were per se a property interest, the effect would be the constitutionalization of the contractual relationships of all governmental entities. No court has yet recognized such a claim of entitlement." *Kelly Kare*, 751 F.Supp. at 1156.

Plaintiffs do not address *Kelly Kare* and try to distinguish Geriatrics on its facts. The Court finds plaintiffs' arguments unpersuasive. While plaintiffs are correct in asserting that a due process property right arises when there exists more than a unilateral expectation of continued employment, *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577

(1974), the Geriatrics court found that, in the Medicaid context, there existed at most a unilateral hope that the contract would be renewed. Geriatrics, 640 F.2d at 264. The contract at issue in this case is terminable at will; therefore, the plaintiffs' attempt to distinguish *Geriatrics* based on a contract termination date is unpersuasive. The Court finds that plaintiffs Evans and SOFS have no protected property interest in the continuation of the SOFS Medicaid provider agreement; Therefore, to the extent the Complaint alleges that Evans and SOFS were denied due process with regard to their alleged property interest in the continuation of the SOFS Medicaid contract, the Complaint is dismissed.

Proposition VI - Dismissal of Claim V Regarding Violation of 42 U.S.C. § 1396a(a)(13)

Count V of the Complaint alleges that defendants violated 42 U.S.C. § 1396a(a)(13) with regard to adequate reimbursement. Plaintiffs also allege that their right to reasonable and adequate reimbursement is supported throughout the Medicaid Act. Defendants cite the current version of 42 U.S. C. § 1396a(a)(13) and argue that the statute merely requires the State to adopt a certain process by which it sets reimbursement rates. Defendants correctly argue that the Complaint does not allege that the State has not complied with the provisions of 42 U.S.C. § 1396a(a)(13). Therefore, to the extent the Complaint alleges a violation of the Medicaid Act's requirement of reasonable and adequate reimbursements based on 42 U. S. C. § 1396a(a)(13), the Complaint is dismissed. The Court takes no position on whether there are other provisions of the

Medicaid Act which provide a cause of action for failure to make adequate reimbursements to providers.

Propositions VII, VIII, and X - Dismissal of Patient Plaintiffs Medicaid and Developmental Disabilities Assistance and Bill of Rights Act Claims

In their motion to dismiss, defendants argue that counts VI, VII, and VIII should be dismissed for a variety of reasons. Plaintiffs disagree and responded to the arguments in their response. As previously noted, the Court requested all parties to submit supplemental briefs that addressed the issue of standing. The Court finds these standing arguments to be of particular relevance with respect to counts VI, VII, and VIII.

It is well settled that there are three elements to the standing requirement. First, plaintiffs must have suffered an "injury in fact" that is (a) concrete and particularized, and (b) actual and imminent. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely that the injury will be redressed by a favorable decision. *United States* v. *Hays,* 515 U.S. 737, 742-43 (1995).

In counts VI, VII, and VIII, plaintiffs assert that defendants have harmed the patient plaintiffs by 1) arbitrarily closing Texoma Mental Health Services, Inc. ("Texoma"), and 2) threatening to close SOFS. Upon review of the Complaint, it appears that the patient plaintiffs lack standing to bring counts VI, VII, and VIII.

As stated by plaintiffs, the patient plaintiffs suffered no disruption of services when the HCA decided not to renew Texoma's Medicaid provider agreement. The Complaint clearly states that "following Texoma's closing, SOFS was servicing nearly the identical population of mentally ill Medicaid recipients as Texoma." Complaint ¶ 50. Even when drawing every inference in favor of the plaintiffs, it does not appear that the patient plaintiffs suffered any injury as a result of Texoma's closure. Specifically, it does not appear that Texoma's closure caused the patient plaintiffs to 1) suffer any lack of access or lack of adequate quality of care (count VI), 2) be denied adequate amount, duration and scope of services (count VII), or 3) be denied appropriate treatment, services and habilitation for their disabilities (count VIII).

Plaintiffs filed this case in February, 2001. At that time, defendants had already suspended their previously issued notice of intent to terminate the SOFS Medicaid provider agreement. SOFS was to be put on a manual billing system designed to verify the necessary documentation. SOFS was to be reimbursed for services that it had been provided once the documentation was verified. This Court's order of February 12, 2001, required defendants to return SOFS to an automated billing procedure; this arrangement continues to this day. At all times, SOFS has been able to collect (whether by automated billing or by manual review) reimbursements that were due. SOFS is currently providing services to the patient plaintiffs.

As for defendants' actions taken with respect to SOFS, plaintiffs do not allege actual and imminent

harms. First, under count VI, plaintiffs only allege that the patient plaintiffs' rights to reasonable access to, and adequate quality of, Medicaid services has been "threatened" by defendants' actions. Second, under count VII, plaintiffs only allege that insufficient amount, duration, and scope of services "will result" should HCA decide to terminate the SOFS provider agreement. Finally, under count VIII, plaintiffs only allege that the potential termination of the SOFS provider agreement "will necessarily result" in the denial of appropriate treatment, services and habilitation to the patient plaintiffs. As previously stated, defendants have not terminated the SOFS provider agreement. In the present case the patient plaintiffs have not yet suffered any harm as a result of defendants' actions. In addition, any future harm that may be suffered is speculative; should plaintiffs prevail on their First Amendment claim, SOFS may retain its Medicaid provider agreement and continue on the automated billing procedure. In the event that the patient plaintiffs do suffer harm in the future, they may file an action at that time. Therefore, the Court finds that the patient plaintiffs lack standing to bring counts VI, VII, and VIII of the Complaint; accordingly counts VI, VII, and VIII are dismissed.

Proposition IX - Claim Regarding Patients' Right to Associate

Claim II of the Complaint asserts that defendants' actions have violated the plaintiff patients' First Amendment right to freely associate. Defendants argue that while the First Amendment does guarantee a general right to freely associate,

their actions do not infringe upon that right. Specifically, defendants argue that the patients do not associate with SOFS and Evans for traditional First Amendment reasons. From the Complaint, it appears the patients associate with Evans and SOFS purely to receive medical services. The Complaint alleges that defendants have disrupted those medical services by cutting Medicaid funding. Plaintiffs have provided no authority to suggest that the HCA's suggested termination of SOFS' Medicaid contract equates to a violation of associational freedoms. It appears that the patients are still free to associate with Evans and SOFS for any reason, medical or otherwise.

It is clear that patients have no property interest in receiving services from one particular Medicaid provider. *O'Bannon* v. *Town Court Nursing Center,* 447 U.S. 773, 785 (1980). In the absence of any authority presented by plaintiffs showing that patients have a First Amendment right to associate with a particular state-supported Medicaid provider, the Court finds the Complaint, to the extent that it alleges a violation of associational freedoms on behalf of the plaintiff patients, should be dismissed.

Remaining Standing Issues

As noted in this Court's July 13, 2001 order, there appears to be some confusion as to whether Evans and SOFS had standing to bring their claims. The parties submitted supplemental briefs in an attempt to clarify the issue; while the briefs submitted tangentially addressed the standing issue, some ambiguity remains. As previously stated, there

are three elements to the standing requirement. First, plaintiffs must have suffered an "injury in fact" that is (a) concrete and particularized, and (b) actual and imminent. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely that the injury will be redressed by a favorable decision. *Hays*, 515 U.S. at 742-43.

Plaintiffs assert that both Evans and SOFS have been retaliated against by the HCA. Specifically, plaintiffs contend that, as a result of exercising their free speech rights, the HCA retaliated against Evans individually and against SOFS. This gives rise to two questions: 1) which free speech rights did Evans and SOFS exercise, and 2) what retaliation did each plaintiff suffer?

Plaintiffs claim that Evans is, in essence, the owner and chief executive officer of SOFS. Plaintiffs' Supplemental Brief at 3. This assertion makes distinguishing between Evans acting 1) in his individual capacity, 2) as a representative of SOFS, and 3) as a representative of Texoma difficult. The Complaint is unclear which First Amendment rights Evans exercised in his individual capacity and which he exercised in his capacity as a representative. Specifically, it is unclear whether Evans undertook his 1) lobbying efforts, 2) letter writing efforts, and 3) information requests in an individual or representative capacity. The Complaint is also unclear as to whether Evans was harmed in his individual capacity. The harms cited by plaintiffs include 1) termination of the SOFS Medicaid provider agreement, 2) termination of the Texoma Medicaid provider agreement, 3) harassing audits, 4)

refusal to allow Evans to appear and be heard at public meetings, and 4) refusals to comply with Evans' open records requests. Of these harms, only the refusal to allow Evans to be heard at meetings and the refusal to comply with open records act requests could be construed as harms suffered by Evans in his individual capacity; the other harms cited clearly were suffered by the entities SOFS and Texoma. Even the refusal to allow Evans to be heard at meetings and the refusal to comply with the open records request might not have been borne by Evans in his individual capacity. If the request to be heard and the records request were made by Evans in a representative capacity, any retaliation would have been suffered by him in a representative capacity.

Unfortunately, it is unclear precisely what plaintiffs are alleging as their First Amendment retaliation causes of action. However, when the Complaint is viewed in the light most favorable to the plaintiffs, the Court must give plaintiffs the benefit of the doubt and conclude that some of Evans' actions were taken in an individual capacity and some were taken in a representative capacity. Therefore, the Court cannot at this time dismiss either Evans or SOFS' First Amendment retaliation claims for lack of standing.

Conclusion:

For the reasons stated more fully above, the Court:

1. GRANTS the motion to dismiss the Complaint against defendants in their official capacity to the extent the Complaint seeks monetary damages;

2. DENIES the motion to dismiss the Complaint for failure to allege individual participation by defendants;

3. DENIES the motion to dismiss the Complaint to the extent it seeks dismissal of defendants Fogarty, Fritz, Mitchell, and Brown of the basis of qualified immunity;

4. DENIES the motion to dismiss counts II, VI, VII, and VIII on the basis of *Burford* abstention;

5. GRANTS the motion to dismiss count III of the Complaint on the basis that neither Evans nor SOFS has a property interest in the continuation of the SOFS Medicaid provider agreement;

6. GRANTS the motion to dismiss count V of the Complaint to the extent it alleges a violation of 42 U.S.C. § 1396a(a)(13);

7. DISMISSES counts VI, VII, and VIII of the Complaint on the grounds that the patient

plaintiffs lack standing to assert these claims;

8. GRANTS the motion to dismiss count II of the Complaint on the basis that the patient plaintiffs have not asserted a First Amendment deprivation upon which relief can be granted.

ENTERED this 14th day of August, 2001.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

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No. 07-980

FILED

MAR 28 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MICHAEL FOGARTY AND TERRIE FRITZ,

Petitioners,

v.

ALFRED MILTON EVANS; SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC.; RUSTLING WINDS, INC.; MORNING STAR MENTAL HEALTH SERVICES, INC.; DIVERSIFIED FAMILY SERVICES, INC.; SERENITY SPRINGS MENTAL HEALTH SERVICES, L.L.C.; JCH, INC.; NEAL THRIFT; NANCY GRAVES-THRIFT; JOHN MAJORS; CYNTHIA MAJORS; CHARLES PARKHURST; MARY PARKHURST; LEROY WHEELER; AND JOEL HOLCOMB,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents Alfred Milton Evans, Neal Thrift, Nancy Graves-Thrift, John Majors, Cynthia Majors, Charles Parkhurst, Mary Parkhurst, Leroy Wheeler, and Joel Holcomb state that they are not stock-issuing corporations and that they have no parent corporations or other corporate stockholders.

Respondents Southeastern Oklahoma Family Services, Inc.; Rustling Winds, Inc.; Morning Star Mental Health Services, Inc.; Diversified Family Services, Inc.; and JCH, Inc. are Oklahoma corporations. The parent company of Rustling Winds, Inc. is Timber Winds, Inc. No publicly-held corporation owns any of Rustling Winds, Inc.'s stock. Diversified Family Services, Inc.; JCH, Inc.; Morning Star Mental Health Services, Inc.; and Southeastern Oklahoma Family Services, Inc. do not have parent corporations, and no publicly-held corporation owns ten percent (10%) or more of their stock. Serenity Springs Mental Health Services, L.L.C. is an Oklahoma limited liability company and not a stock-issuing corporation.

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STATEMENT OF THE CASE

Respondents adopt the facts as set forth in the Tenth Circuit's Order and Judgment filed August 22, 2007, Pet'r App. pp. 1a-53a, and as set forth in the Tenth Circuit's Order and Judgment filed January 26, 2005. *See infra* App. 78-81.

With regard to Petitioners' Statement of the Case, Respondents object to any and all facts suggesting that Petitioners' conduct toward Respondents was based on a budgetary, as opposed to a retaliatory, motive. Petitioners' facts are slanted in their own favor and are premised primarily on the District Court's grant of Petitioners' motion for judgment as a matter of law after the second jury trial. Petitioners do not discuss, in detail, the findings of either jury or the findings of the Tenth Circuit.

Additionally, Petitioners do not make this Court aware of OKLA. STAT. ANN. tit. 51, § 162(A)(2), which impacts Petitioners' personal liability for the compensatory damages awarded. That statute states, in pertinent part:

> A. The state or any political subdivision, subject to procedural requirements imposed by this section, other applicable statute, ordinance, resolution, or written policy, shall:
>
> 2. Pay or cause to be paid any judgment entered in the courts of the United States, the State of Oklahoma or any

> other state against any employee or political subdivision. . . .

REASONS FOR DENYING THE WRIT

Petitioners are high-ranking state officials who abused their positions and implemented a regime of lawless conduct by retaliating against Respondents for speaking publicly about the State of Oklahoma's Medicaid system. Respondents' only means of vindicating their First Amendment right to free speech are damages. The Tenth Circuit's opinion does not, as Petitioners contend, unfairly impose liability on state officials who were simply doing their job but, rather, holds high-ranking state officials accountable for their intentional abuse of power and deprivation of Respondents' First Amendment right to free speech.

The Tenth Circuit's finding that Petitioners had waived their qualified immunity defense does not conflict with the decisions of other circuit courts and is not in tension with the principles of qualified immunity established by this Court.

The standard of review applied by the Tenth Circuit to the District Court's grant of a new trial is not contrary to this Court's decisions and does not exacerbate an existing conflict among the courts of appeals.

And finally, the Tenth Circuit's reinstatement of the punitive damages awards against Petitioners

after the first trial does not merit review, as a reasonable relationship exists between the amount of punitive damages that were awarded after the first trial and the probable amount of compensatory damages that will be awarded after remittitur.

I. This Court Should Deny The Petition For A Writ Of Certiorari As To The Qualified Immunity Issue Because The Issue Is Moot, The Tenth Circuit's Finding Of Waiver Does Not Conflict With The Decisions Of Other Circuits, And Petitioners Are Not Entitled To The Protection Afforded By Qualified Immunity.

A. Whether Petitioners Should Have Been Allowed To Assert Qualified Immunity At The Second Trial Is Moot, Because The District Court Abused Its Discretion In Granting A Second Trial.

In their Petition for a Writ of Certiorari, Petitioners try to blur the true issue on appeal to this Court with regard to qualified immunity. Petitioners did not argue to the Tenth Circuit that the District Court had erred in prohibiting them from asserting qualified immunity at the *first* trial, as Petitioners had not even attempted to assert the defense at the pre-trial/post-discovery phase, at the trial phase, or at the post-trial phase of the *first* trial. Nor did Petitioners argue to the Tenth Circuit that the District Court had erred in denying their motion to dismiss, in which they had asserted qualified immunity at the

pleading phase of the *first* trial. The actual issue that Petitioners presented to the Tenth Circuit was whether the District Court had erred in not allowing them to rely on the defense subsequent to the first trial but prior to the second trial. The Tenth Circuit abstained from answering that question, however, because it found that the District Court had abused its discretion in granting a second trial at all, thus rendering moot the question of whether the District Court had erred in denying Petitioners use of the defense in advance of the second trial.

As explained more fully in Subsection (II) below, the Tenth Circuit correctly held that the District Court had abused its discretion in granting a second trial. For that reason, this Court need not now address whether the District Court should have allowed Petitioners to assert qualified immunity in advance of the second trial, as the issue continues to be moot. Because the Tenth Circuit reinstated the first jury verdict, the real issue before this Court is whether the Tenth Circuit erred in finding that Petitioners had waived their qualified immunity defense for purposes of the *first* trial.

The Tenth Circuit did not err in finding that Petitioners had waived their qualified immunity defense for purposes of the first trial. And, even if the Tenth Circuit improperly overturned the District Court's grant of a new trial, the District Court did not abuse its discretion in prohibiting Petitioners from asserting qualified immunity in advance of the *second* trial, because Petitioners' failure to press qualified

immunity at the first trial effectuated waiver for purposes of the second trial, as well.

B. The Tenth Circuit Correctly Found That Petitioners Had Waived Their Qualified Immunity Defense For Purposes Of The First Trial, And The Tenth Circuit's Finding Of Waiver Does Not Conflict With The Decisions Of Other Circuit Courts.

By presenting a distorted version of the Tenth Circuit's finding and by providing incomplete accounts of other circuit courts' opinions, Petitioners give the appearance that a circuit split exists with regard to waiver of qualified immunity, hoping that this Court will grant a writ of certiorari to resolve the supposed conflict among the circuit courts. In actuality, however, the issue on which the circuit courts are supposedly split was not the basis of the Tenth Circuit's finding of waiver.

Specifically, Petitioners argue that the Tenth Circuit departed from the decisions of other circuit courts when it found that Petitioners had waived their qualified immunity defense for failure to include it in the pretrial order. But, the Tenth Circuit did not find that Petitioners had waived their qualified immunity defense solely because they had failed to include it in the pretrial order. Rather, the Tenth Circuit found that Petitioners had waived the defense because they had neglected to press it at every opportunity. They had "failed to assert qualified immunity

in their motions for summary judgment, the pretrial order, or in their oral motions for [judgment as a matter of law] at the close of the plaintiffs' case." Pet'r App. pp. 16a-17a n.9. Therefore, any authority cited by Petitioners as standing for the proposition that qualified immunity is not waived if not included in the pre-trial order (*i.e.*, *Calderon v. Witvoet*, 999 F.2d 1101 (7th Cir. 1993); *Nagy v. Riblet Prod. Corp.*, 79 F.3d 572 (7th Cir. 1996)), is wholly irrelevant in determining whether the Tenth Circuit erred in finding that Petitioners had waived their qualified immunity defense. Moreover, even if the Tenth Circuit's finding had been premised solely on Petitioners' failure to include the defense in the pre-trial order, *Calderon* and *Nagy* would lend no support to Petitioners' position, as those cases held that an affirmative defense must generally be included in the pretrial order to be preserved but that an exception exists when the district court has foreclosed the defense from trial. As explained more fully below, the District Court did not foreclose Petitioners' qualified immunity defense from the first trial.

At first blush, it appears that Petitioners are arguing that failure to include qualified immunity in the pretrial order should not result in waiver; however, a closer look reveals that Petitioners are, in fact, arguing that qualified immunity lives forever and that it may be pressed for the first time seven (7) months *after* the conclusion of a jury trial. Petitioners' position, however, is simply untenable, as even the First and Fifth Circuits, which Petitioners cite as

allowing the defense to be raised at *any* time, hold that, at some point, qualified immunity must be cut off.

This Court has stated that qualified immunity is an affirmative defense that must be raised by the defendant. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). As an affirmative defense, qualified immunity may be waived if not properly raised. *See Farquhar v. Jones*, 141 Fed. Appx. 539, 540 (9th Cir. 2005) (not published in the Federal Reporter) (***holding that qualified immunity had been waived when raised for the first time in an objection to the magistrate judge's report***); *Stephenson v. Doe*, 332 F.3d 68, 76 (2d Cir. 2003) (explaining that qualified immunity can be waived by failure to raise it in a timely fashion or by failure to raise it with sufficient particularity); *Eddy v. Virgin Islands Water & Power Auth.*, 256 F.3d 204, 209-10 (3d Cir. 2001) (***stating that a district court has discretion to determine whether the defendant diligently raised qualified immunity***); *Skrtich v. Thornton*, 280 F.3d 1295, 1306-07 (11th Cir. 2002) ("Qualified immunity is an affirmative defense to personal liability, which must be pled, and if it is not, it is deemed waived."); *Sales v. Grant*, 224 F.3d 293, 294-96 (4th Cir. 2000) (***holding that the defendants, who had only cursorily referenced qualified immunity in their answer, could not pursue the defense for the first time on remand for a new trial***); *English v. Dyke*, 23 F.3d 1086, 1090 (6th Cir. 1994) (***"[T]he trial court has***

discretion to find a waiver if a defendant fails to assert the defense within time limits set by the court or if the court otherwise finds that a defendant has failed to exercise due diligence or has asserted the defense for dilatory purposes.") (citation omitted); *Maul v. Constan*, 928 F.2d 784, 785-86 (7th Cir. 1991) (***holding that the defendants, who had asserted "good faith immunity" in their answer, had not sufficiently preserved the defense and could not urge it for the first time in a post-trial motion***); *Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597, 601 (5th Cir. 1988) (***declining to review whether appellants were entitled to qualified immunity, because they had not "squarely posed" the issue until filing a motion for new trial***).

The point at which qualified immunity is deemed waived may vary, depending on the deciding court and the circumstances of the case. But, the fact that qualified immunity may be waived is undisputed, and as noted in the above parentheticals, district courts have discretion in deeming the defense waived.

Respondents recognize that qualified immunity may be asserted at various stages of litigation and that failure to assert the defense at one stage does not necessarily preclude the defendant from asserting the defense at a later stage. However, a defendant may not casually assert the defense at the beginning of a lawsuit and then rely on that one assertion for the duration of the case, which is exactly what Petitioners are urging.

Petitioners asserted qualified immunity prior to the first trial in a motion to dismiss, which the District Court denied, and then again in their answers. *See infra* App. 15-23, 48, 97; Pet'r App. pp. 115a-18a. Thereafter, Petitioners failed to press the defense. They did not assert it in their motions for summary judgment. They did not include it in the pre-trial order. They did not submit it with their proposed jury instructions. And, they did not raise it in their motions for judgment as a matter of law at trial. *See infra* App. 77-81. In fact, Petitioners did not forcefully press the defense again until seven (7) months *after* the first trial, when they retained new counsel to represent them at the second trial and requested leave of court to file a motion for summary judgment on the ground of qualified immunity, which request the District Court denied. *See infra* App. 82, 84-88.

Petitioners now argue that they did not need to press their qualified immunity defense subsequent to the District Court's denial of their motion to dismiss, claiming that the denial was a final resolution of Petitioners' entitlement to the defense for the entire duration of the litigation. Petitioners, however, may not use the District Court's denial of their motion to dismiss at the pleading stage of the first trial as an excuse for their failure to reassert the defense at later stages of the litigation.

Whether a defendant is entitled to qualified immunity is analyzed differently at the summary-judgment phase than it is at the motion-to-dismiss phase. "At that earlier stage, it is the defendant's

conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.' On summary judgment, however, the plaintiff can no longer rest on the pleadings, . . . and the court looks to the evidence before it (in the light most favorable to the plaintiff). . . ." *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996).

Simply because the District Court found that Petitioners could not be dismissed from suit at the pleading stage of the first trial, because Respondents had sufficiently alleged a violation of a clearly established constitutional right in their complaint, was no guarantee that the District Court would find that the evidence produced during discovery was sufficient to support the violation alleged in Respondents' complaint. Therefore, if Petitioners had thought that the evidence produced during discovery did not support the violation alleged in Respondents' complaint, then Petitioners could, and should, have asserted qualified immunity in a motion for summary judgment at the pre-trial/post-discovery phase of the first trial. *See id.* ("It is no more true that the defendant who has unsuccessfully appealed denial of a motion to dismiss has no need to appeal denial of a motion for summary judgment, than it is that the defendant who has unsuccessfully *made* a motion to dismiss has no need to *make* a motion for summary judgment."). Because Petitioners did not assert qualified immunity in their motions for summary judgment, they did not even give the District Court the opportunity to evaluate whether they were immune from facing the burden of

trial. Moreover, because they did not bother to press the defense at trial, they did not give the District Court the opportunity to evaluate whether they were immune from liability.

Petitioners cite *Guzmán-Rivera v. Rivera-Cruz*, 98 F.3d 664 (1st Cir. 1996) to support their position that the Tenth Circuit erred in finding waiver. *Guzmán-Rivera*, however, actually provided the basis of the Tenth Circuit's finding. Pet'r App. p. 17a n.9.

The defendants in *Guzmán-Rivera* asserted qualified immunity on the eve of trial. Although the First Circuit held that the defendants had not waived the defense for trial, it did hold that they had waived it for the pre-trial/post-discovery phase, meaning the defendants were not immune from suit, even if they might later be found immune from liability.

The First Circuit expressed concern in *Guzmán-Rivera* with regard to a defendant's intentional delay in asserting qualified immunity for the purpose of prejudicing the plaintiff. To help reduce such tactical delay, the First Circuit encouraged district courts to enter scheduling orders, stating:

> Delay generated by claims of qualified immunity may work to the disadvantage of the plaintiff. Witnesses may become unavailable, memories may fade, attorneys fees accumulate, and deserving plaintiffs' recovery is delayed. *See Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) ("Defendants may seek to stall because they gain from delay at

> plaintiffs' expense, an incentive yielding unjustified appeals."). Delay is also costly to the court system, demanding more time and energy from the court and retarding the disposition of cases. . . .
>
> In order to reduce the potential for abuse by defendants, we believe that the defense of qualified immunity may be deemed to have been waived if it is not raised in a diligent manner during the post-discovery, pre-trial phase. To find otherwise is to invite strategic use of the defense by defendants who stand to benefit from delay. . . .
>
> [D]istrict courts are encouraged to enter scheduling orders to prevent dilatory tactics on the part of defendants with qualified immunity defenses. Absent an abuse of discretion, this court will enforce those scheduling deadlines by affirming a finding of waiver and awarding double costs.

Id. at 667-69.

Petitioners are not similar to the defendants in *Guzmán-Rivera*, because not only did Petitioners fail to diligently press qualified immunity at the pre-trial/post-discovery phase of the first trial, they also failed to diligently press qualified immunity at the trial itself and at the post-trial phase of the first trial. Moreover, Petitioners did not appeal the District Court's denial of their motion to dismiss premised on qualified immunity. *See infra* App. 78. The first time that Petitioners diligently reasserted their qualified immunity defense was approximately seven

(7) months *after* the first trial, when they filed a motion seeking leave of court to file a motion for summary judgment based on qualified immunity. *See infra* App. 84-88. Petitioners' failure to press the defense prior thereto is the very type of prejudicial delay about which the First Circuit expressed concern in *Guzmán-Rivera*. And, even if the purpose of Petitioners' delay was not to intentionally prejudice Respondents, prejudice would have resulted had the Tenth Circuit allowed Petitioners to escape liability for their misdeeds after a jury verdict. Petitioners' delay in asserting the defense appears to be one last-ditch attempt to escape liability after gambling and losing on the jury's verdict. As explained by the Tenth Circuit in its opinion, however, qualified immunity "is not a parachute to be deployed only when the plane has run out of fuel." Pet'r App. p. 17a n.9.

Petitioners also cite to *O'Connor v. Huard*, 117 F.3d 12 (1st Cir. 1997) to support their contention that the Tenth Circuit erred in not considering the substantive elements of their qualified immunity defense on appeal. Like *Guzmán-Rivera*, however, *O'Connor* is distinguishable.

In *O'Connor*, also a First Circuit case, the defendant waited to assert qualified immunity until filing a motion notwithstanding the verdict. On appeal, the First Circuit reviewed the district court's denial of the defendant's motion. But, the First Circuit reviewed the denial for plain error only, because it found that the defendant had *not* properly preserved the defense

by raising it for the first time after the verdict. *Id.* at 17.

The case *Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993), also cited by Petitioners, is somewhat similar to the instant case in that the Fifth Circuit had to decide whether to review the district court's denial of the defendant's motion for summary judgment based on qualified immunity, which had not been filed until *after* a new trial had been granted. The Fifth Circuit ultimately decided to review the denial. But, it noted that it was not deciding whether a defendant who has not presented qualified immunity at the first trial may present it at the second trial, because the Fifth Circuit found that the defendant *had* sufficiently presented qualified immunity at the first trial. Although the defendant had not moved to dismiss on the ground of qualified immunity in advance of the first trial and had not specifically included qualified immunity in the pre-trial order, he had (1) incorporated into the pre-trial order all of the defenses asserted in his answer to the complaint, which included qualified immunity; (2) argued immunity at the close of plaintiff's case and at the close of evidence; and (3) included in the jury instructions elements for immunity.

Unlike the defendant in *Spann*, Petitioners did not assert qualified immunity at the first trial. Rather, they reasserted it seven (7) months *after* the first trial. Thus, the Fifth Circuit's decision to review the district court's denial of the defendant's motion for summary judgment in *Spann* lends no support to

Petitioners' contention that the Tenth Circuit erred in not considering the substantive elements of their qualified immunity defense, as the defendant in *Spann* had sufficiently preserved his qualified immunity defense for appeal by asserting it at the first trial.

Petitioners also cite *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1320 & n.10 (11th Cir. 2000) and *Kelly v. City of Oakland*, 198 F.3d 779, 784 (9th Cir. 1999) to support their contention that qualified immunity may be reviewed on appeal even if it was not raised at trial. Once again, however, Petitioners mischaracterize the facts of the authority they cite.

Like the defendant in *Spann*, the defendant in *Alexander* raised qualified immunity at trial, as she raised it at the close of the plaintiff's case. And in *Kelly*, the defendants asked for a jury instruction containing elements of qualified immunity and then raised qualified immunity again by motion after the verdict, which the district court denied on the ground that the defendant had not asserted qualified immunity in a motion prior to jury deliberation. Like the First Circuit in *O'Connor*, 117 F.3d at 17, the Ninth Circuit in *Kelly* found that the defendant had waited too long to assert the defense. Although the Ninth Circuit reviewed the district court's denial, it did so only for plain error and only in the interest of justice, stating: "We have . . . occasionally reviewed for plain error even when no motion for judgment as a matter of law was made." The Ninth Circuit, in no way, stated that a denial of qualified immunity ***must*** be

reviewed on appeal if not properly preserved, however.

As stated hereinabove, the stage at which qualified immunity is deemed waived varies, depending on the court and the circumstances of the case. Some courts allow defendants to assert qualified immunity for the first time very late into the proceedings, while others deem the defense waived. The Tenth Circuit is actually quite lenient. If the defendant has properly raised qualified immunity in an answer, in a motion to dismiss, or in a motion for summary judgment but then does not reassert the defense until after trial, the Tenth Circuit will still review the district court's denial of the defense. *Marshall v. Columbia Lea Reg'l Hosp.*, 474 F.3d 733, 739 (10th Cir. 2007) ("[A] post-trial grant of immunity would still confer a benefit by shielding [defendants] from any liability for the monetary damages awarded by the jury.") (citing *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 562 n.6 (1st Cir. 2003)). It will just review the evidence in the light "most hospitable" to the party that prevailed at trial. *Id.* (citing *Iacobucci v. Boulter*, 193 F.3d 14, 23 (1st Cir. 1999)).

The Tenth Circuit did not review the substantive elements of Petitioners' qualified immunity defense for purposes of the first trial, because although Petitioners had raised the defense in their motions to dismiss and in their answers, they had not reasserted it at the first trial or during the post-trial phase of the first trial. Reasserting it seven (7) months *after* the first trial is simply too late. Despite Petitioners'

wishes, qualified immunity does ***not*** live forever. Petitioners had numerous opportunities to assert the defense: (1) they could have asserted it prior to the first trial in a motion for summary judgment; (2) they could have included it in the pre-trial order; (3) they could have submitted it with their proposed jury instructions; (4) they could have asserted it at the first trial after the Respondents' case-in-chief; (5) they could have asserted it after presenting their own case at the first trial; and (6) they could have asserted it in a motion notwithstanding the verdict. Petitioners failed to take advantage of all of these opportunities. For that reason, the Tenth Circuit was not unreasonable in deeming the defense waived for purposes of the first trial, and the District Court did not abuse its discretion in deeming the defense waived for purposes of the second trial.

C. Even If The Tenth Circuit Erred In Concluding That Petitioners Had Waived Their Qualified Immunity Defense For Purposes Of The First Trial, The Error Was Harmless Because Petitioners Are Not Entitled To The Protection Afforded By Qualified Immunity.

Qualified immunity is just that – qualified. It does not protect from civil damages government officials performing discretionary functions whose conduct violates a clearly established statutory or constitutional right of which a reasonable person would have known. *Harlow*, 457 U.S. at 818.

There is no doubt that Respondents were engaged in protected First Amendment activity when they were speaking publicly about the State of Oklahoma's Medicaid system, and Petitioners did not dispute this fact on appeal to the Tenth Circuit. Pet'r App. p. 18a. The First Amendment right to free speech is a clearly established right. *Bennett v. Hendrix*, 423 F.3d 1247, 1255 (11th Cir. 2005); *McGreevy v. Stroup*, 413 F.3d 359, 366-67 (3d Cir. 2005); Pet'r App. pp. 115a-18a.

Respondents presented a lot of evidence at trial proving that Petitioners had retaliated against them for speaking publicly about Oklahoma's Medicaid System. For example, Respondent Cynthia Majors testified that Petitioner Fogarty had threatened that if her husband, Respondent John Majors, continued to lobby at the Capitol, "he could send someone down to investigate [her] nursing home for fraudulent billing." Pet'r App. p. 36a. And, even before the first trial, the District Court found that the evidence presented by Respondents demonstrated "an uncanny correlation" between Respondents' exercise of free speech rights and the administrative actions taken by the Oklahoma Health Care Authority. *See infra* App. 59-63. The District Court also found that Respondents were "likely to succeed in showing that the [Petitioners] took certain retaliatory actions in response to the exercise of First Amendment rights. . . ." *See infra* App. 63. Then, two different juries concluded that Petitioners had retaliated against Respondents for speaking publicly about the State of Oklahoma's Medicaid system and that Petitioners'

conduct had not been for a budgetary purpose. Even in the District Court's February 23, 2005 order after the second trial, the District Court denied Petitioner Fogarty's motion for judgment as a matter of law as to all individual Respondents, except for Mary Parkhurst and Joel Holcomb. And, if that is not enough to prove that Petitioners' violated Respondents' First Amendment right to free speech, the Tenth Circuit, after reviewing all of the evidence on appeal, stated:

> [W]e are satisfied that a reasonable juror could conclude that Fritz and Fogarty acted with "reckless or callous indifference," if not "evil motive or intent," to the rights of the [Respondents]. *Hardeman* [*v. City of Albuquerque*], 377 F.3d [1106,] 1121. Plaintiffs met with persistent hostility from Fritz and Fogarty, and were subject to a wide variety of injuries in relation for their political activities. A reasonable juror could conclude, based on the evidence before it, that Fogarty and Fritz wanted to silence members of the Association, were embarrassed by their lobbying efforts, and acted to starve them of Medicaid funding in an effort to put them out of business. This type of behavior is the sort that is properly answered by punitive damages, which act "to punish what has occurred and to deter its repetition." *Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1309 (10th Cir. 2003).

Based on the foregoing, Petitioners certainly violated a clearly established constitutional right of which any reasonable person would have known. No reasonable person in Petitioners' position would have

thought that it was legal to intentionally deny Medicaid reimbursement to deserving individuals simply because they had engaged in public speech regarding Oklahoma's Medicaid system. Qualified immunity does not protect government officials from civil damages for such malicious conduct. Therefore, whether the Tenth Circuit erred in finding waiver for purposes of the first trial or whether the District Court abused its discretion in finding waiver for purposes of the second trial is completely irrelevant, because Petitioners would not have been immune from liability in any event. As such, this Court should deny the Petition for a Writ of Certiorari as to the qualified immunity issue.

II. The Alleged Split Among The Circuit Courts With Regard To The Proper Standard Of Review Of A Trial Court's Grant Of A New Trial Is Merely One Of Semantics And Not Of Substance.

Petitioners quote the following statement from the United States Supreme Court case *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 435 (1996) as support for their contention that the Tenth Circuit reviewed the District Court's *grant* of a second trial too stringently: "[A]ppellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice." Petitioners have taken this statement from *Gasperini* out of context, however, as *Gasperini* concerned what standard of review, if any, a federal appellate court should apply to a district court's *denial* of a motion for a new trial premised on

excessive damages. Thus, Petitioners' argument that *Gasperini* lowered the standard of review for the *grant* of a new trial premised on *insufficient evidence* is without merit. Furthermore, while Petitioners primarily cite pre-*Gasperini* cases, in which a more exacting scrutiny was applied, to bolster their argument that a more exacting scrutiny is a thing of the past, the truth is that since *Gasperini*, the circuit courts have continued to subject the *grant* of a new trial to more exacting scrutiny, particularly when the grant was premised on the ground that the evidence did not support the jury's verdict.

The precise issue presented in *Gasperini* was whether federal appellate courts could apply a New York state law that gave them the power "to review the size of jury verdicts and to order new trials when the jury's award 'deviate[d] materially from what would [have] be[en] reasonable compensation.'" *Id.* at 418. Stated more simply, the issue was whether *appellate* judges, who were not present at the trial, possess the power to vacate a jury verdict on the ground of excessiveness and to order a new trial when the district judge, who *was* present at the trial, declined to do so. On appeal to the United States Supreme Court, this Court held that appellate judges do possess such power, but only if the district judge abused his discretion in denying a new trial.

The reason why the holding in *Gasperini* is significant is because, at one time, it was the law that the trial court's denial of a motion for a new trial, based on the ground that the verdict was against the weight of the evidence or that the verdict was

excessive or inadequate, was not reviewable at all, because such review was "deemed inconsonant with the Seventh Amendment's Reexamination Clause."[1] *Id.* at 434; 11 CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2818, p. 197, § 2819, p. 200 (2d ed. 1995). The holding in *Gasperini* finally put to rest all doubt that appellate judges, who were not present at the trial, have the power to set aside a jury verdict and to order a new trial, despite the trial judge's refusal to do so. *Id.* at § 2819, p. 204. Thus, this Court's statement that "appellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice" simply means that appellate judges do not violate the Reexamination Clause of the Seventh Amendment when they review a district court's *denial* of a new trial.

Despite Petitioners' assertion that *Gasperini* should have governed the Tenth Circuit's review of the District Court's *grant* of a new trial, "[d]ifferent considerations apply when the trial court has *denied* [a] motion [for a new trial] than when it has *granted* it and the problems must be considered separately." *Id.* at § 2819, p. 198-99 (emphasis added). *See also* Michelle

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[1] The Seventh Amendment of the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Migdal Gee, Annotation, *What Standards Govern Appellate Review of Trial Court's Conditional Ruling, Pursuant to Rule 50(c)(1) of Federal Rules of Civil Procedure on Party's Motion for New Trial,* 52 A.L.R. FED. 494 § 2 (originally published in 1981) ("It has been recognized that closer appellate scrutiny is required when a new trial has been granted . . . than when it has been denied . . . , since in the latter situation the trial judge has left standing the jury's determination and, therefore, has in no way abridged the parties' right to a jury trial."). "It has also generally been held that the degree of appellate scrutiny depends on the *reasons* for the ruling. . . . Where the stated reason for granting a new trial was the weight of the evidence . . . , the appellate courts . . . scrutinize[ ] the ruling more closely. . . ." *Id.* (emphasis added). The reason why appellate courts scrutinize the *grant* of a new trial that is premised on insufficient evidence more closely than they scrutinize the *denial* of a new trial is because:

> There is no Seventh Amendment problem . . . if the appellate court reverses the trial court's *grant* of a new trial [on the ground that the verdict was against the weight of the evidence]. In this instance the appellate court is not reexamining facts found by a jury but is reinstating the jury's findings as against the contrary findings of the judge. Appellate action in this context protects the role of the jury, as envisioned by the Seventh Amendment, rather than running contrary to it.

11 FEDERAL PRACTICE AND PROCEDURE § 2819, p. 205 (emphasis added).

By quoting more-stringent-scrutiny language from the opinions of certain circuit courts, Petitioners try to give the appearance that a split exists among the circuit courts with regard to the proper standard of review for the *grant* of a new trial. However, the circuit courts unanimously agree that the proper standard of review is abuse of discretion. Simply because some circuit courts examine the evidence more closely than others does not mean that those courts are not giving proper deference to the district court's decision or that a substantive circuit split exists. At best, the split among the circuit courts is one of semantics.

Petitioners cite no case law from the First Circuit, but as stated above, the articulated standard of review in the First Circuit for the grant of a new trial is abuse of discretion. *United States v. Rivera Rangel*, 396 F.3d 476, 485-86 (1st Cir. 2005). Although the First Circuit does not use the same terminology that the Tenth Circuit uses to define "abuse of discretion," the standard of review employed by the First Circuit appears to be very much like the one employed by the Tenth Circuit, because the First Circuit will find an abuse of discretion if there was merely "ample" evidence to support the jury's verdict and if the jury's verdict was not "seriously erroneous." *Id.* at 486 (stating that "[t]here are 'definite limits upon a

district court's right to upset a jury verdict' ") (citation omitted).

Like the First Circuit, the Second Circuit acknowledges "the need [for] particularly close appellate scrutiny where the trial judge grants a new trial solely because the judge regards the verdict as against the weight of the evidence." *See Crane v. Consol. Rail Corp.*, 731 F.2d 1042, 1048 (2d Cir. 1984). The Second Circuit even uses the same language that the First Circuit used in *Rivera Rangel* to describe the circumstances under which a trial judge has authority to grant a new trial. *See Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 261 (2d Cir. 2002) (stating that a district court may grant a new trial on the basis that the verdict was against the weight of the evidence only if the jury reached a "seriously erroneous" result or if allowing the verdict to stand would result in a miscarriage of justice) (citation omitted). *See also United States v. Robinson*, 430 F.3d 537, 543 (2d Cir. 2005) (stating that "the court may not wholly usurp the jury's role" and that the trial judge may intrude upon the jury function only where exceptional circumstances can be demonstrated) (citation omitted).

Like the First and Second Circuits, the articulated standard of review for the grant of a new trial in the Third Circuit is abuse of discretion. *Wilburn v. Maritrans GP Inc.*, 139 F.3d 350, 363 (3d Cir. 1998) (citation omitted). At the same time, however, the Third Circuit exercises a "closer degree of scrutiny" when the district court *grants* a motion for a new trial

on the ground that the verdict is against the weight of the evidence, because the Third Circuit is cognizant of the potential for a district court to substitute its judgment for that of the jury. *Id.* (citation omitted). *See also id.* at 364 ("[T]his court has held that 'new trials because the verdict is against the weight of the evidence are proper only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience.'") (citation omitted).

Similarly, the Fourth Circuit's articulated standard of review for the grant of a new trial is abuse of discretion. *Creech v. Nguyen*, 153 F.3d 719, 1998 WL 486354, at *8 (4th Cir. 1998) (unpublished opinion) (citation omitted). Yet, like the First, Second, and Third Circuits, the Fourth Circuit exercises a "closer degree of scrutiny and supervision" when reviewing the grant of a new trial on the ground that the verdict was against the weight of the evidence. *Id.* "A closer degree of scrutiny is warranted to protect the litigant's Seventh Amendment right to a jury trial." *Id.*

Petitioners list the Fifth Circuit as being one of five circuit courts to apply a lower standard of federal appellate review to the grant of a new trial. It is no surprise, then, that the Fifth Circuit's articulated standard of review is abuse of discretion. *Carbo Ceramics, Inc. v. Keefe*, 166 Fed. Appx. 714, 717, 2006 WL 197340, at *1 (5th Cir. 2006) (not selected for publication in the Federal Reporter) (citation omitted). Nevertheless, just like the First, Second, Third,

and Fourth Circuits, the Fifth Circuit scrutinizes the grant of a new trial more closely than it scrutinizes the denial of a new trial, and unless the Fifth Circuit is able to independently satisfy itself that the jury verdict was against the great weight of the evidence, it will not affirm the grant of a new trial. *Id.*

As in the other circuits, abuse of discretion is the articulated standard of review in the Sixth Circuit for the grant of a new trial. *Denhof v. City of Grand Rapids*, 494 F.3d 534, 543 (6th Cir. 2007). In practice, however, the Sixth Circuit exercises a "closer degree of scrutiny and supervision" when reviewing the grant of a new trial premised on insufficient evidence than it exercises when reviewing the grant of a new trial premised on some other basis, such as "some undesirable or pernicious influence obtruding into the trial." *Id.* (citations omitted). Therefore, unless the jury's verdict is unreasonable, the Sixth Circuit will not affirm the grant of a new trial. *Id.*

With regard to the Seventh Circuit, Petitioners cite *Medcom Holding Co. v. Baxter Travenol Lab., Inc.*, 106 F.3d 1388 (1997). In *Medcom*, the Seventh Circuit stated that it had, at one time, applied a "somewhat more exacting" standard of review than ordinary abuse of discretion to the grant of a new trial but that such practice is no longer necessary in light of *Gasperini*. *Id.* at 1397. Despite that statement, however, the Seventh Circuit went on to hold in *Medcom* that the district court had abused its discretion in vacating the first jury's verdict and in ordering a new trial. *Id.* at 1405-06. What is more,

the justification given for its holding was that the evidence was "sufficient" to support the verdict and that the jury awards had "a reasonable basis." *Id.* at 1402, 1405-06. "Sufficient" and "reasonable" suggest that the Seventh Circuit does not, in practice, give any more deference to the district court's grant of a new trial than the other circuit courts give. Therefore, even though the Seventh Circuit claims that it no longer applies a "somewhat more exacting" standard of review to the grant of a new trial, in actuality, it does.

Petitioners list the Eighth Circuit as being another one of five circuit courts to apply a lower standard of federal appellate review to the grant of a new trial. As in all of the other circuits, the articulated standard of review in the Eighth Circuit is abuse of discretion. *United States v. Bertling*, 510 F.3d 804, 807 (8th Cir. 2007) (citation omitted). Although the Eighth Circuit does not speak in terms of "closer scrutiny" or "more stringent scrutiny" with regard to the grant of a new trial premised on insufficient evidence, the Eighth Circuit has stated that "[m]otions for new trials based on the weight of the evidence are generally disfavored" and that "the district court must grant a new trial 'sparingly and with caution.'" *Id.* at 808. Thus, the Eighth Circuit will overturn a district court's decision to grant a new trial if "the evidence in a particular case does not 'preponderate [ ] heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand.'" *Id.* at 808 (citation omitted).

Like the First Circuit, Petitioners cite no authority from the Ninth Circuit with regard to the proper standard of appellate review for the grant of a new trial premised on insufficient evidence. As in all of the other circuits, though, the articulated standard of review in the Ninth Circuit is abuse of discretion. *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248 (9th Cir. 1998) (citations omitted). However, the Ninth Circuit is one of several circuit courts that actually uses the "stringent standard" language to describe the standard of review that is applied to the grant of a new trial based on insufficient of evidence. *Id.*

The articulated standard of appellate review in the Eleventh Circuit for the grant of a new trial premised on insufficient evidence is also abuse of discretion. *United States v. Hernandez*, 433 F.3d 1328, 1337 (11th Cir. 2005). And, like the Ninth Circuit, the Eleventh Circuit speaks in terms of "close scrutiny." *Id.*

The District of Columbia Circuit is no different. Like all of the circuit courts of appeals, the articulated standard of review for the grant of a new trial is abuse of discretion, and "a more searching inquiry" is made when reviewing the district court's *grant* of a new trial, particularly when the grant was premised on insufficient evidence. *Langevine v. Dist. of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997) (citations omitted).

In the instant case, the Tenth Circuit expressly stated that it reviews a trial judge's decision on a

motion for new trial for *abuse of discretion* but that it examines the *grant* of a new trial based on insufficient evidence more closely than it examines the *denial* of a new trial to ensure that the district court does not substitute its judgment for that of the jury. Pet'r App. pp. 15a-16a.

In light of the foregoing authority, it could not be any clearer that the Tenth Circuit applied the very same standard of review that the other circuit courts apply when reviewing the grant of a new trial based on insufficient evidence. Although the terminology used to describe the standard of review differs somewhat between circuits, the standard of review actually applied is the same. As such, this Court should deny the Petition for a Writ of Certiorari with regard to the standard-of-review issue.

III. The Tenth Circuit Correctly Reinstated The Punitive Damages Awards Against Petitioners, Because The Amount Of The Punitive Damages Awards Is Nearly Three Times *Less* Than The Probable Amount Of Compensatory Damages That Will Be Awarded After Remittitur.

Petitioners' argument that the Tenth Circuit erred in reinstating the punitive damages awards while remitting or remanding most of the compensatory damages is extremely weak. Respondents recognize that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." *BMW*

of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (U.S. 1996) (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (U.S. 1993)). Respondents further recognize that the ratio of the punitive damages award to the actual harm inflicted on the plaintiff is a factor to consider in determining whether a punitive damages award violates the Due Process Clause. *BMW of N. Am., Inc.*, 517 U.S. at 581. Even further, Respondents recognize that setting a punitive damages award at "two, three, or four times the size of compensatory damages, while 'not binding,' is 'instructive,' and that '[s]ingle-digit multipliers are more likely to comport with due process.'" *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1061-62 (U.S. 2007) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). However, the punitive damages awarded in the instant case are not even remotely close to violating the single-digit multiplier rule, as the punitive damages award of $900,000 is nearly three (3) times *less* than the probable individual damages that will be awarded after remittitur. And, although corporate damages have yet to be determined, Petitioners' liability to the corporate Respondents has been determined, so the corporate Respondents are certain to be awarded ***some*** compensatory damages, which will further increase the compensatory damages award over the mere $900,000 punitive damages award.

The first jury awarded Respondent Alfred Milton Evans $300,000 in compensatory damages against Fogarty and $150,000 in compensatory damages

against Fritz. The Tenth Circuit reinstated both of those awards, holding that a combined award of $450,000 did not shock the judicial conscience.

With regard to Respondents John Majors, Joel Holcomb, Neal Thrift, Nancy Thrift, and Charles Parkhurst, the first jury awarded compensatory damages against Petitioners as follows:

	Award Against Fogarty	**Award Against Fritz**
John Majors	$825,000	$375,000
Joel Holcomb	$780,000	$390,000
Neal Thrift	$900,000	$450,000
Nancy Thrift	$900,000	$450,000
Charles Parkhurst	$600,000	$300,000
TOTAL	**$4,005,000**	**$1,965,000**

The Tenth Circuit held that these awards were appropriate for remittitur. Although the Tenth Circuit did not dictate the amount by which these awards should be reduced, it noted that the reduction in *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152 (10th Cir. 1981) was two-thirds. Thus, reducing each of these five (5) Respondents' awards by two-thirds, Respondents will recover the following amounts after remittitur:

	Award Against Fogarty	Award Against Fritz
John Majors	$275,000	$125,000
Joel Holcomb	$260,000	$130,000
Neal Thrift	$300,000	$150,000
Nancy Thrift	$300,000	$150,000
Charles Parkhurst	$200,000	$100,000
TOTAL	**$1,335,000**	**$655,000**

Hence, even after remittitur, these five (5) Respondents will still receive a combined total of $1,990,000 ($1,335,000 + $655,000) in compensatory damages.

With regard to Respondent Leroy Wheeler, the first jury awarded $177,000 in compensatory damages against Fogarty and $88,500 in compensatory damages against Fritz. The Tenth Circuit remanded the verdict and directed the trial court to enter a remittitur order of $1.00 in nominal damages against Fogarty and $1.00 in nominal damages against Fritz, for a total damages award of $2.00.

The first jury awarded Respondent Cynthia Majors $300,000 in compensatory damages against Fogarty and $150,000 in compensatory damages against Fritz. The Tenth Circuit recommended that Cynthia Majors' damages be reduced to $50,000, as was done to the plaintiff's emotional damages in *Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989).

With regard to Respondent Mary Parkhurst, the first jury awarded $600,000 in compensatory damages

against Fogarty and $300,000 in compensatory damages against Fritz. The Tenth Circuit did not suggest the amount of remittitur for Ms. Parkhurst's award but stated that it may counsel a reduction greater than two-thirds. Thus, assuming that the District Court reduces her award by an amount between three-fourths and four-fifths, Ms. Parkhurst will likely receive a total award of approximately $200,000.

Based upon the foregoing, the total ***individual*** damages – after remittitur – will most likely be somewhere in the neighborhood of $2,690,002 ($450,000 + 1,990,000 + $2.00 + $50,000 + $200,000). A $900,000 punitive damages award is almost three (3) times ***less*** than the amount of probable total individual damages that will be awarded after remittitur. And, although the corporate damages have yet to be determined, Petitioners' liability to the corporate Respondents has been determined and, therefore, the total compensatory damages for both the corporate Respondents and the individual Respondents will be even greater than $2,690,002, further widening the gap between the total compensatory damages awarded to Respondents and the mere $900,000 punitive damages awarded against Petitioners. Thus, Petitioners' argument that the Tenth Circuit should have remanded the punitive damages award to ensure that a reasonable relationship ultimately exists between the compensatory damages award and the punitive damages award is extremely weak.

Petitioners try to gain this Court's sympathy by stating that neither the State of Oklahoma nor insurance will pay the punitive damages awarded against them. However, Petitioners' own conduct necessitated punitive damages, and while the second jury awarded fewer punitive damages than the first jury did, the fact that two different juries, as well as the Tenth Circuit, have found Petitioners' conduct deserving of punitive damages is indicative of the reprehensibility of Petitioners' conduct.

Petitioners' having to pay the cost of acting with reckless or callous indifference, or with evil motive or intent, to the Respondents' rights to free speech does not arouse much sympathy from Respondents and should not arouse much sympathy from this Court, either. During the course of this seven-year litigation, Petitioners have avoided serving their punishment, and Respondents have gone without retribution. It is time for Petitioners to finally realize the magnitude of their actions, which can only be accomplished by payment of the first jury's punitive damages award. As such, this Court should deny the Petition for a Writ of Certiorari as to the punitive damages issue.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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App. 1

No. CIV-01-252-W

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

---

(1) ALFRED MILTON EVANS, et al.,

Plaintiff,

vs.

(1) MIKE FOGARTY, et al.,

Defendants.

DEFENDANTS' MOTION TO DISMISS
AND BRIEF IN SUPPORT

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) ALFRED MILTON EVANS, et al., Plaintiff,	)	
v.	)	**Case No. CIV-01-252-W**
(1) MIKE FOGARTY, et al., Defendants.	)	

DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

COME NOW the Defendants and respectfully request this Court to dismiss Plaintiffs' First Amended Complaint. Defendants submit the following brief in support of this request.

BRIEF IN SUPPORT

STATEMENT OF THE CASE

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983. The Plaintiffs claim their federal constitutional and statutory rights have been violated by the Defendants. Plaintiffs ask for injunctive, declaratory and monetary relief.

PROPOSITION I

THE ELEVENTH AMENDMENT PREVENTS THIS COURT FROM EXERCISING JURISDICTION OVER STATE OFFICIALS IN THEIR OFFICIAL CAPACITY WHEN THE PLAINTIFF IS SEEKING RELIEF OTHER THAN PROSPECTIVE INJUNCTIVE RELIEF.

Plaintiffs have brought suit against all of the Defendants in their official capacities. It is well settled that a suit against a person in his or her official capacity is, in fact, a suit against the entity itself. As the Supreme Court stated:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. . . . Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." . . . . As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.

Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). A judgment in a § 1983 action against an official "in his official capacity" imposes liability against the entity that he represents. *Brandon v. Holt,* 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985). Because an official capacity suit is, in fact, a suit against the entity, a plaintiff cannot recover money damages in such a suit. "The Court has held that, absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court." *Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099, 3102, 87 L.Ed.2d 114 (1985). *See also, Pennhurst State School v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67, 78-79 (1984). Here, there has been no waiver by the State of Oklahoma, *Nichols v. Department of Corrections,* 631 P.2d 746 (Okla. 1981), *see also* 51 O.S. §§ 151, et seq, and no congressional override. The Eleventh Amendment bars damages against the Defendants in their official capacities.

There is a further bar to damages against Defendants in their official capacities. When acting in those capacities, Defendants are not "persons" within the meaning of § 1983. The Supreme Court made that perfectly clear when it wrote: "we hold that neither a State nor its officials acting in their official capacities are "persons" under § 1983." *Will v. Michigan Department of State Police,* 491 U.S. 58, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989), the Supreme Court left no doubt that an official acting in his official capacity is not a person under § 1983 and is immune from suit

by operation of the Eleventh Amendment. The Court held that:

> A state official who is sued in his or her official capacity for nonprospective relief is not a "person" under § 1983, because (1) a state is not a "person" under § 1983, and (2) a § 1983 suit for nonprospective relief against a state official in his or her official capacity is not a suit against the official, but rather is a suit against the official's office and, as such, is no different from a suit against a state itself.

Id., 105 L.Ed.2d at 58.

Generally, a State and its agencies are entitled to immunity under the Eleventh Amendment for actions brought in federal courts, whether the action seeks damages or equitable relief. However, there is another exception to this rule. A party may sue pursuant to *Ex Parte Young,* 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908). The *Ex Parte Young* doctrine holds that the Eleventh Amendment generally does not bar a suit against a state official in federal court which seeks only prospective equitable relief for violations of federal law. In the present case, Plaintiffs seeks [sic] injunctive, declaratory and monetary relief from Defendants. The Eleventh Amendment and the decision in *Will* both bar Plaintiffs' claims to the extent Plaintiffs seeks [sic] relief other that [sic] prospective injunctive relief. Accordingly, Defendants are entitled to denial of Plaintiffs' requested relief.

PROPOSITION II

THE PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED REGARDING COUNTS I, II & IV AGAINST DEFENDANTS FOGARTY, FRITZ, BROWN, AND ALL OHCA BOARD MEMBERS BECAUSE THE ALLEGATIONS IN THE COMPLAINT LACK ANY ALLEGATION OF PERSONAL PARTICIPATION AND LACK ANY SPECIFICITY REGARDING RETALIATION FOR PLAINTIFFS EVAN'S ALLEGED STATEMENTS.

In civil rights matters complaints must contain specific allegations of fact, which indicate a deprivation of constitutional rights. *Alfaro Motors, Inc. v. Ward,* 814 F.2d 883, 887 (2nd Cir. 1987). Allegations which contain general conclusions that shock a person, but omit specific allegations are not sufficient. *Barr v. Abrams,* 810 F.2d 358, 363 (2nd Cir. 1987). Moreover, it is clear that a civil rights complaint must allege personal participation by the Defendants to gain monetary relief. *Colon v. Coughlin,* 58 F.3d 865, 873 (2nd Cir. 1995). Allegations of respondent [sic] superior in section 1983 cases are not sufficient to survive a 12 (b) (6) motion. *Monell v. Dept. of Social Services of the City of New York,* 436 U.S. 658, 690-695, 98 S. Ct. 2018, 2035-2039, 56 L. Ed. 2d 611 (1978). A heightened pleading requirement is required however, when officials are sued in their individual capacities. *Lee v. County of Los Angeles,* 240 F.3d 754 (9th Cir. 2001). *See also Branch v. Tunnell,* 14 F.3d 449, 450 (9th Cir. 1994). This heightened pleading

requirement is especially important when knowledge, intent, and qualified immunity are possible defenses. *Id.*

The Plaintiffs seek monetary damages from the Defendants in this case. *See* Relief Requested on page 23 of the Amended Complaint, subsections E and F. In paragraphs 18 to 31 of the Complaint Plaintiffs describe Defendants. Defendant Fogarty is described as CEO of OHCA. Defendant Fritz is described as the Director of Behavioral Health for OHCA. Defendant Mitchell is described as the State Medicaid Director. Defendant Brown is described as the Legislative Liaison for OHCA. All OHCA Board members are described. But for Plaintiffs' allegation that Defendant Mitchell "is responsible for the termination of the Plaintiffs' Medicaid provider agreement" there is nothing but conclusory allegations in the Amended Complaint.

For example, in paragraph 22 Plaintiff [sic] state, "Each of these Defendants has taken steps under color of their official title to exercise the authority vested in them by the State of Oklahoma for purposes beyond the bounds of their official duties". In paragraphs 43 to 57 labeled "General Factual Allegations" the Plaintiffs state that "Defendants took this action", (paragraph 48), "Defendants notified" (paragraph 48), "as a result of the actions of Defendants" (paragraph 49) "affiliation . . . was discovered by Defendants" (paragraph 51), "a swarm of auditors from HCA descended" (paragraph 52), the Defendants were terminating the Plaintiff's provider agreement" (paragraph 55) "The Defendants and the Board members

consistently deny reimbursement" (paragraph 56) and finally "the Defendants action will necessarily result in the denial of adequate physical facilities" (paragraph 57).

In not one paragraph of these general allegations nor any allegation in the Counts later provided by Plaintiffs, do the Plaintiff [sic] identify which Defendant allegedly retaliated against the Plaintiffs. The Plaintiffs do not state what knowledge each Defendant had of his public speech. Plaintiff does not allege that any Defendant had intent to retaliate against Plaintiff Evans, Plaintiff SOFS, or recipient Plaintiffs. In fact, in paragraph 51 Plaintiffs allege (and this allegation must be taken as true) that Evans assumed a role with SOFS as a contract consultant rather than as an owner "to avoid retaliation.[1]

Given the fact that monetary damages are requested, and that Plaintiffs sue officials of the State in their individual capacities, and that these officials have a defense of qualified immunity in this case, Plaintiffs' allegations in the Amended Complaint do not arise to more than conclusory allegations. While the allegations may shock a reasonable person who reads them, nothing in the Amended Complaint other than the allegation that the Medicaid Director terminated a contract shows any retaliatory intent or knowledge of Mr. Fogarty, Ms. Fritz or Ms. Brown or

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[1] The inference here is that Plaintiff Evans sought to hide who he was so officials would not retaliate.

any Board member. Moreover, given the fact that legally the OHCA Board has no statutory operational responsibilities (Contrast 63 Okla. Stat. § 5007 with 5008) Plaintiffs' allegations that the Board retaliated must be plead for the Defendants to defend the case.

Plaintiffs' Complaint fails to specifically plead personal participation on behalf of the Defendants. Plaintiffs merely plead general allegations. Accordingly, Plaintiffs' Complaint does meet the requirements necessary to survive a 12(b)(6) motion to dismiss

PROPOSITION III

DEFENDANTS FOGARTY, FRITZ, MITCHELL AND BROWN ARE ENTITLED TO QUALIFIED IMMUNITY, IN THEIR INDIVIDUAL CAPACITIES ON PLAINTIFFS' FIRST AMENDMENT CLAIMS.

There is within the jurisprudence of this country a qualified immunity which shields a public official from lawsuits. The immunity finds its basis in a balancing of the interests of the public.[2] The immunity is an

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[2] As the United States Court of Appeals for the Eleventh circuit has stated:

> Suits against government officials for damages against them individually are costly not only for the defendants, but for society as a whole. The social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.

(Continued on following page)

"*immunity from suit* rather than a mere defense to liability." *Hunter v. Bryant,* 502 U.S. 224, 116 L.Ed.2d 589, 595 (1991) (emphasis supplied). As this is an immunity from suit, the United States Supreme Court has repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation. *Id.*

Qualified immunity, according to the United States Supreme Court, holds that government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). As a result;

> [t]he qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. The accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued.

> Qualified immunity recognizes that where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences.

Post v. City of Fort Lauderdale, 7 F.3d 1552, 1556 (11th Cir 1993) (internal citations omitted).

Hunter v. Bryant, 502 U.S. ___, 116 L.Ed.2d 589, 596 (1991).

The procedure for analyzing a defense of qualified immunity is as follows:

> Once the defendant raises a qualified immunity defense, the plaintiff assumes the burden of showing that the defendant violated the clearly established law. To overcome the qualified immunity defense, the Plaintiff must identify a clearly established statutory or constitutional right of which a reasonable person would have known, and then allege facts to show that the defendant's conduct violated that right.

Breidenbach v. Bolish, 126 F.3d 1288, 1291 (10th Cir. 1997)

A. Presumption in favor of Qualified Immunity.

There exists a presumption of qualified immunity in favor of the Defendants. Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from a suit for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard. *Davis v. Scherer,* 468 U.S. 183, 190, 104 S.Ct. 3012, 82 L.Ed.2d 139, 147 (1984).

B. Plaintiffs Burden.

Once the defendant raises qualified immunity, the plaintiff must come forward with additional allegations. *Sawyer v. County of Creek,* 908 F.2d 663, 665 (10th Cir. 1990). The Tenth Circuit has stated that a plaintiff cannot meet his burden to demonstrate that the right in question was clearly established by "merely identifying a clearly established right and then alleging that the defendant has violated it. The contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Id.* at 666. "Once a qualified immunity defense has been raised . . . , the plaintiff is held to a heightened standard of pleading." *Id.* at 667. See also, *Breidenbach v. Bolish, supra* at 1292.

The burden is on the Plaintiff to both plead and prove that federal rights were clearly established and that a violation of those clearly established rights occurred. *Applewhite v. U.S. Air Force,* 995 F.2d 997, 1000-01 (10th Cir. 1993). The "clearly established" standard is difficult for a plaintiff to meet. *Medina v. City and County of Denver,* 960 F.2d 1493, 1498-99 (10th Cir. 1992). "Clearly established" is predicated on a finding that "in light of pre-existing law the unlawfulness is apparent." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Plaintiff must show that a reasonable person would have understood that his actions violated clearly established federal rights. *Jantz v. Muci,* 976 F.2d 623, 627 (10th Cir. 1992). Failure to convince the

court that the law was clearly established calls for the dismissal of the complaint with prejudice, *Sawyer, supra,* at 667; or entry of judgment for the defendants. *Hidahl v. Gilpin County DSS,* 938 F.2d 1150, 1155 (10th Cir. 1991).

C. How "clear" must the law be to be "Clearly established?"

In determining whether the law is clearly established, the 10th Circuit has stated that: for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City and County of Denver,* 960 F.2d 1493, 1498 (10th Cir. 1992) (citation omitted).

D. State of the "clearly established" law relating to the First Amendment protections of a government contractor.

In the case of *Board of County Com'rs, Wabaunsee County, Kan v. Umbehr,* 116 S.Ct. 2342, 518 U.S. 668, 135 L.Ed.2d 843 (1996), the Supreme Court addressed the issue of the level of First Amendment protection a government contractor may claim. The Court ruled that government contractors are entitled to First Amendment protections, subject to application of the balancing test set out in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Co.,*

Ill., 88 S.Ct. 1731, 391 U.S. 563, 20 L.Ed.2d 811(1968). However, the *Umbehr* Court refused to establish a bright line rule for establishing a government contractors First Amendment protections.

In the *Pickering* case the Court held that a government employee has First Amendment protections when speaking about the governmental employer. However, the *Pickering* Court did not establish a bright line rule that all speech of a governmental employee is protected. The Court established a balancing test that requires the reviewing court to weigh the interests of the employee against the interest of the government. In *Pickering* the Court stated;

> [W]e do not deem it either appropriate or feasible to attempt to lay down a general standard against which all statements may be judged. . . . However, in the course of evaluating the conflicting claims of First Amendment protection . . . , we shall indicate some of the general lines along which an analysis of the controlling interests should run."

Pickering at 1735.

The Supreme Court in *Pickering* clearly established that government employees have First Amendment Protection sometimes, but the Court was not sure exactly when those times are, so it established a test for the reviewing courts to utilize on a case by case basis.

The *Umbehr* Court adopted the "general lines" of the *Pickering* Court and said that this will be the test for evaluating a government contractors First Amendment Protections. The *Umbehr* Court stated;

> We therefore see no reason to believe that proper application of the *Pickering* balancing test cannot accommodate the differences between employees and independent contractors. There is ample reason to believe that such a nuanced approach, which recognizes the variety of interests that may arise in independent contractor cases, is superior to a bright-line rule distinguishing independent contractors from employees.

Umbehr at 2349.

To make this perfectly clear. It has been clearly established by the United States Supreme Court, that when evaluating a government contractors First Amendment protections that the reviewing court is to utilize a nuanced approach with no bright line rule that recognizes the variety of interests that may arise in independent contractor cases, however there is not a general standard against which all statements may be judged.

The Tenth Circuit ruled that the defendants were entitled to qualified immunity in their individual capacities due to the uncertainty of the law in the area of a government contractor's First Amendment protections. *Umbehr v. McClure,* 44 F.3d 876 (10th

Cir. 1995).[3] This decision was made before the nuanced approach of *Board of County Com'rs, Wabaunsee County, Kan v. Umbehr,* 116 S.Ct. 2342, 518 U.S. 668, 135 L.Ed.2d 843 (1996) was established. However, the law in the area of a government contractor's First Amendment protection is still very unclear.

Just last year the Eleventh Circuit granted qualified immunity to government employees, sued in their individual capacity, by a government employee, that claimed her First Amendment rights had been violated. The Court stated:

> Because the analysis of First Amendment retaliation claims under the Pickering-Connick test "involve[s] legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules . . . a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful."

Maggio v. Sipple, 211 F.3d 1346, 1354 (11th Cir. 2000) citing *Martin v. Baugh,* 141 F.3d 1417, 1420 (11th Cir.1998).

The United States Supreme Court and the federal courts of appeal struggle when evaluating First Amendment claims by government employees and

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[3] This is the case that was appealed in *Board of County Com'rs, Wabaunsee County, Kan v. Umbehr,* 116 S.Ct. 2342, 518 U.S. 668, 135 L.Ed.2d 843 (1996), however the issue of qualified immunity was not appealed. *See Umbehr* at 2346.

government contractors. If the justices in the highest courts in the land have difficulty determining this issue it is reasonable to assume that employees of the Oklahoma Health Care Authority will have difficulty. It has not been clearly established that Plaintiffs are entitled to First Amendment protections.

E. Motion to Dismiss and Qualified Immunity.

The only thing that is clear in the present case is that the Defendants are entitled to qualified immunity. The United States Supreme Court cannot determine with certainty when a government contractor is entitled to First Amendment protections. Defendants, Fogarty, Fritz, Mitchell and Brown are shielded from liability for civil damages because their conduct did not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Accordingly, Defendants Fogarty, Fritz, Mitchell and Brown are entitled to qualified immunity.

PROPOSITION IV

THE COURT SHOULD ABSTAIN FROM DECIDING PLAINTIFF'S CLASS CLAIMS BASED UPON THE BURFORD ABSTENTION DOCTRINE.

In Counts II, VI, VII, and VIII, the Plaintiffs bring class claims against the Defendants. *See* Paragraph 38 of Amended Complaint. More specifically, in

Count II the Plaintiffs allege a violation of their First Amendment Rights (a disruption of services, para. 67 of Amended Complaint); in Count VI the Plaintiffs allege that they are denied reasonable access to and adequate quality of care (the denial of reimbursement and arbitrary and capricious termination of contract of SOFS, para. 87 of Amended Complaint); in Count VII they allege a violation of amount, scope and duration (significantly disrupted services . . . deemed to be medically necessary, para. 95 of Amended Complaint); and in Count VIII they claim a violation of the Developmental Disabilities Assistance Act (termination of treatment by certain clinicians and lack of other treatment, para. 103 of Amended Complaint). In all these claims the Plaintiff Class asserts that the disruption or elimination of medically necessary services or inadequate reimbursement at SOFS will damage them.

In the case of *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), the United States Supreme Court considered an appeal from the Fifth Circuit Court of Appeals regarding an administrative order from the Railroad Commission. In this case, the Railroad Commission had issued a permit to drill four (4) oil wells on the east Texas field. The jurisdiction of the Court was based upon diversity of citizenship and the challenge to the Order was based upon alleged due process improprieties in the issuance of the Order. The Supreme Court assumed jurisdiction was proper but decided as a matter of sound equitable discretion to abstain from deciding

the case. The Court's reasoning was that the complexities of Texas' oil and gas law dictated that the federal court abstain from deciding the case. Moreover, the Court found Texas had a well-organized system of regulation and review. The review process was legislated to prevent multiple courts from deciding oil and gas issues.

The theoretical underpinnings of the *Burford* doctrine has been described in the case of *Bethphage Lutheran Service, Inc. v. Weicker,* 965 F.2d 1239, 1243 (2nd Cir. 1992) as follows:

> The Supreme Court has characterized *Burford* abstention as appropriate where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. We have held that the aim of *Burford* abstention is to "avoid resolving difficult state law issues involving important public policies or avoid interfering with state efforts to maintain a coherent policy in an area of comprehensive regulation or administration," ("[A]bstention pursuant to *Burford* is designed to avoid federal court interference with specialized ongoing state regulatory schemes . . . ").

The *Burford* doctrine underpinnings has [sic] been recognized as applicable in the Medicaid program in the case of *Osteopathic Hospital Founders Assn., Inc. v. Splinter,* 955 F. Supp. 1351 (N.D. Okla. 1996). In this case the United States District Court for the

Northern District of Oklahoma held that the *Burford* abstention doctrine applied to a Medicaid reimbursement case in which the Plaintiff hospital sought injunctive relief in higher reimbursement rates from the Oklahoma Health Care Authority. The Osteopathic Hospital court considered four questions to determine the applicability of the Burford doctrine: (1) did the Medicaid regulations provide a comprehensive statutory framework to formulate policy and decide cases; (2) was there a state scheme of regulation that should be properly interpreted by a state agency; (3) was the subject matter in Medicaid an area of legitimate state interest; and (4) was the issue one of complex and difficult state law.

In the present case this Court should find that the *Burford* abstention doctrine applies to dismiss the claims of the class members. First, a complex statutory framework in Medicaid currently exists for clients who have services denied, services suspended, or are denied services because of medical necessity decisions. This regulatory scheme is broadly defined by federal law and carried out by the Defendants through the Oklahoma Administrative Procedures Act. Under 42 U.S.C. § 1396A(a) (3) and 42 C.F.R. § 431.210 evidentiary hearings must be conducted for those whose services are denied or suspended. See also OAC (Oklahoma Administrative Code) § 317:2-1-2.[4]

---

[4] Under OHCA's administrative rules, if the case involves a recipient then a "Program Panel" of agency experts hears the case before an evidentiary hearing is held. OAC 317: 2-1-2.2.

After an administrative hearing, review under state law exists with the Chief Executive Officer of the Oklahoma Health Care Authority and the state district court. 63 Okla.Stat. § 5052(D) (Supp. 2000). Under this complex process there are three levels of agency administrative review (the Program Panel, the ALJ and the CEO) as well as state district court review. Under the second factor for abstention to apply, the Court should find that the agency should be given the authority to interpret its regulations in the Medicaid program. As for adequacy of rates, the Osteopathic case specifically noted the state's need to control reimbursement and the problem with divisive reimbursement rates possibly caused by federal court judgments. More importantly here, questions surrounding the medical necessity of services and the adequacy of services, quality of services and the denial of services are best left to the judgment of the state agency. The uniformity of these decisions is imperative for the Medicaid agency to properly administer the State Plan. With respect to the third factor in applying the *Burford* doctrine, the Court should find that the state remedy is available to each recipient named by the Plaintiff and the remedy is afforded each recipient. Finally, regarding the fourth prong of the test to apply the *Burford* doctrine, the Court should find the question regarding what care is medically necessary and whether there is disruption of services due to the termination of one service provider are complex questions which require the application of Medicaid law. As the Court is aware by the pleadings, each of the recipients has a different

disease, a different treatment course and a different set of both pharmacological needs, as well as therapy needs. Each of these cases is best left to state officials who can devote its administrative process to develop the facts to entertain the complaints of the Plaintiffs.

Based on the complexity of the federal law in this case and state remedy afforded each recipient, this Court should dismiss the claims of the class because of the *Burford* abstention doctrine.

PROPOSITION V

THE COURT SHOULD DISMISS COUNT III BECAUSE THERE IS NO CONSTITUTIONAL PROPERTY INTEREST THAT WOULD NECESSITATE DUE PROCESS RIGHTS TO PLAINTIFFS.

In Count III of the Amended Complaint Plaintiff asserts that "Plaintiff had a clearly established property interest in the facilities operated by SOFS and in the continued operation of business at those facilities. This includes the continued receipt of Medicaid reimbursement." *See* Amended Complaint, para. 68. Plaintiff also asserts that this right was taken without due process, and without any rational basis. *See* Amended Complaint para. 73.

The contract between the Health Care Authority and SOFS involves no constitutionally protected property interest in the Medicaid program.

The law in this area of Medicaid is clear and longstanding. In the case of *Geriatrics, Inc. v. Harris,* 640 F.2d 262 (10th Cir. 1981) (cert. denied 454 U.S. 832, 70 L.Ed. 2d 109, 102 S. Ct. 129) the United States Court of Appeals for the Tenth Circuit considered a case in which the Colorado Medicaid agency decided not to renew a Medicaid contract to a nursing home. The claim of the plaintiff in the case was that the State of Colorado could not fail to renew the contract without a hearing and due process. The allegations of the Plaintiffs in this case are very similar to the allegations in the Amended Complaint in this case. The Tenth Circuit stated,

> Eventide assets that it had an expectation of continued participation in the Medicaid Program and this was a "property interest" to be protected under due process. Also, that it had more than a unilateral claim or mere expectance.

Geriatrics, Inc. 640 F.2d at 265.

In finding no property interest protectable under the United States Constitution, or federal Medicaid statutes, the Court stated:

> Eventide is not the intended beneficiary of the Medicaid program. Instead, the purpose underlying the funding program is to extend financial benefits to the patients eligible to receive their medical care at government expense. Eventide argues also that termination of benefits would force the Home to close and that it therefore has a significant financial

> interest to retain its certification. The Home's financial need for government assisted patients is incidental to the purpose and design of the program. Eventide's operating license has not been resided and it may still operate as a nursing home and render care to private-pay patients. The unfortunate reality that it will probably encounter difficulty operating at capacity is not of constitutional significance.

Geriatrics, Inc. v. Harris, 640 F.2d 262, 265 (10th Cir. 1981).

Similarly, in the case of *Kelly Care, LTD. v. O'Rourke,* 751 F.Supp. 1154 (S.D. N.Y. 1990) (aff'd at 930 F.2d 170, cert. denied 502 U.S. 907, 116 L.ED. 2d 244, 112 S.Ct. 300) The State of New York cancelled the contract with the provider, giving the provider notice for a non-cause termination for personal care services to Medicaid recipients. The Plaintiffs sued the state and alleged that its due process rights were violated and requested injunctive relief under constitutional and federal law. The Plaintiffs also alleged that a constitutional liberty interest was raised by the mere implication that the termination of a contract had negative implications. The Court rejected both arguments finding no property or liberty interest claim.

While it is unclear what plaintiffs in the Amended complaint have this due process interest, like Plaintiff SOFS and Plaintiff Evans, no Medicaid recipient has any protectable life, liberty, or property

interest in receiving services from a particular provider after being transferred from one Medicaid provider to another. *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 785, 65 L.ED. 2d 506, 518, 100 S. Ct. 2467 (1980).

In the present case, the Court should dismiss Count III from the Amended Complaint against all Defendants. Plaintiffs have no protectable property or liberty claim in the contract with OHCA.

PROPOSITION VI

THE COURT SHOULD DISMISS PLAINTIFF'S CLAIMS IN COUNT V BECAUSE PLAINTIFFS DO NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In Count V of the Amended Complaint Plaintiffs continue to allege that Defendants violated 42 U.S.C. § 1396 A (a)(13) with regard to adequate reimbursement. Plaintiffs simply assert that Defendants circumvented and ignored the "proper method" to set reimbursement rates. Further, the Plaintiff's claim reimbursement has been denied them during their course of business.

Nowhere in the Amended Complaint does Plaintiff state what basis in law the reimbursement rates were set improperly, or how reimbursement has been denied. If the Court were to accept Plaintiff's allegations as true, no violations of law would occur. First, 42 U.S.C. § 1396 A (a)(13) was repealed in 1997. *See* Section 4711 of (a) of Pub. L. 105-33 (1997). *See* also

Page 12 of the Court's Order dated February 12, 2001. Despite the Court's finding the Plaintiff continues to assert the claim.

Second, the current version of 42 U.S.C. § 1396 A (a) (13) does not protect Plaintiff's business. It provides,

> for a public process for determination of rates of payment under the plan for hospital services, nursing facility services, and services of intermediate care facilities for the mentally retarded. . .

Plaintiff is not a hospital, a nursing facility or an intermediate care facility for the mentally retarded. *See* paragraphs 6,7, and 8, Amended Complaint. Because this statute does not afford Plaintiffs any protection and the Plaintiff has failed to identify any other state or federal law which dictates how Plaintiff is protected by the setting of rates, the claims in Count V should be dismissed.

PROPOSITION VII

PLAINTIFF CLAIMS IN VII SHOULD BE DISMISSED BECAUSE BASED UPON THE MEDICAID REQUIREMENTS OF AMOUNT, SCOPE AND DURATION NO VIOLATION OF LAW CAN OCCUR ASSUMING THE ALLEGATIONS IN THE COMPLAINT ARE TRUE.

The Plaintiff in paragraphs 43 to paragraph 57 allege that in retaliation of Mr. Evan's First Amendment rights, OHCA cancelled the contracts of two (2)

behavioral health facilities. Based upon this single set of facts, in paragraphs 92 to 99 Plaintiffs assert that "amount, scope, and duration" of services has been violated. More specifically, Plaintiffs allege that, "the termination of the SOFS Medicaid provider agreement will significantly and drastically reduce the availability of mental health and behavioral health services in Southeastern Oklahoma." Also, Plaintiffs allege that "Defendants actions have disrupted services or will lead to grossly unequal services." Based upon the Amended Complaint all of Plaintiff's charges are based upon SOFS' termination as a provider.

Under the Medicaid Act the requirement of amount, scope and duration is found at 42 U.S.C. § 1396 A(a) (10) (B). This statute provides that the medical assistance made available to any individual described in subparagraph (A) (those who are categorically or medically needy) "shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual. . . ." The federal regulation underlying this federal law requirement provides:

> The plan must specify the amount, duration, and scope of each service that it provides for –
>
> (1) The categorically needy; and
>
> (2) Each covered group of medically needy.

> Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose
>
> The Medicaid Agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440,210 and 440,220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.
>
> The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

The Plaintiff's claim should be dismissed on this claim because the sole claim of the Plaintiff is the absence of SOFS's participation in the program somehow violates the amount, scope and duration requirement. The requirement of amount, scope, and duration in the Medicaid program involves a requirement of services in the "State Plan". Both the requirement of statute and the regulation begins with, "the State Plan or the plan must". The State Plan is the agency's blueprint for the services it covers. *See* 42 CFR § 431.40 and 431.50. There is not a single allegation in the Amended Complaint, in all 103 paragraphs regarding the State Plan and how it denies any recipient services. Assuming allegations in the Complaint are true, nothing in the state plan denies any recipient any service. Furthermore, every case Defendant's counsel could find construing the amount, scope, and duration requirement involves the systemic denial of a certain service to a recipient

not a denial of one provider's contract. For example, in *Hern v. Beye,* 57 F.3d 906 (10th Cir. 1995) the Tenth Circuit Court of Appeals considered the State of Colorado's systemic restriction of abortion services. In *DeSario v. Thomas,* 139 F.3d 80 (2nd Cir.1998) the Second Circuit considered Connecticut's systemic use of a list to allow or disallow durable medical equipment services. In *Ledet v. Fischer,* 638 F. Supp1288 (M.D. La. 1986) the Court considered the State of Louisiana's plan which limited services to one pair of glasses after cataract surgery. In none of these cases, or any case construing this section of the law is amount, scope or duration violated by the absence of one or two contractors in the Medicaid Program. Based upon all of the allegations in Count VII of the Amended Complaint Plaintiffs have not stated a claim upon which relief can be granted.

PROPOSITION VIII

PLAINTIFF'S CLAIM UNDER COUNT VIII FOR A VIOLATION OF 42 U.S.C. § 6009 SHOULD BE DISMISSED BECAUSE THIS LAW HAS BEEN REPEALED.

In paragraphs 100 to 103 of the Amended Complaint the Plaintiffs allege that 42 U.S.C. § 6009 was violated by Plaintiff's ability to no longer receive services at SOFS. As the Court pointed out in its order of February 12, 2001, 42 U.S.C. § 6009 was repealed by Public law No. 106-402 § 1401 (a). Even prior to the repeal of this law, the United States Supreme Court ruled that the Bill of Rights did not

confer any substantive rights to treatment for disabled persons and that Congress had unconstitutionally attempted to exert its power under the spending clause by enacting the law. *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 18, 101 S.Ct. 1531, 67 L.Ed. 2d 694, 708 (1981). For these reasons, the claims in Count VIII should be dismissed.

PROPOSITION IX

THE CLASS PLAINTIFFS' FREEDOM OF ASSOCIATION CLAIM IS WITHOUT MERIT.

Count II of Plaintiffs' Complaint proposes that the alleged retaliation by the Defendants violates the class Plaintiffs' First Amendment right of freedom of association. The question is, freedom to associate with whom? The class Plaintiffs do not assemble as a group for purposes of associating to advocate mental health rights. The class Plaintiffs individually seek treatment for behavioral health issues. Likewise, the class Plaintiffs do not associate with SOFS as a group for the purpose of exchanging ideas. Plaintiffs go to SOFS for treatment. The First Amendment protects certain intimate human relationships as well as the right to associate for the purpose of engaging in those expressive activities otherwise protected by the Constitution. *Freeman v. City of Santa Anna,* 68 F.3d 1180, 1188 (9th Cir. 1995).

The class Plaintiffs have not been deprived of an associational right guaranteed by the Constitution.

Accordingly, Count II of Plaintiffs' Complaint should be dismissed.

PROPOSITION X

THE CLASS PLAINTIFFS' CLAIM FOR REASONABLE ACCESS AND ADEQUATE QUALITY IS WITHOUT MERIT.

The class Plaintiffs allege, at Count VI of the Complaint, that they have been denied access to Medicaid services and certain levels of quality in care. At paragraph 87 of the Complaint Plaintiffs claim that the denial of services was caused by the "denial of reasonable and adequate reimbursement to healthcare providers and the arbitrary and capricious termination of SOFS' Medicaid provider agreement." *See* paragraph 87 of Plaintiffs' Complaint. These facts to not give rise to a cause of action. SOFS' Medicaid provider agreement has not been terminated. In addition, Plaintiffs argument as to denial of reasonable and adequate reimbursement is the same argument mad [sic] at Count V of Plaintiffs' Complaint. Defendant has briefed the reasons why County [sic] V of Plaintiffs' Complaint should be dismissed at Proposition VI of this brief. The same argument applies to Plaintiffs' reasonable and adequate reimbursement argument in Count VI of the Complaint. Accordingly, Count VI of Plaintiffs' Complaint should be dismissed.

CONCLUSION

Wherefore based on the foregoing arguments and authorities Defendants respectfully request this Court to dismiss Plaintiff's Complaint and award Defendants a reasonable attorney's fee; plus any other relief this Court deems just and proper.

Respectfully submitted,

/s/ Greg S. Eldridge
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CERTIFICATE OF MAILING

On this 4th day of April, 2001, a true and correct copy of the foregoing was filed and mailed, postage prepaid, to:

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/s/ Greg S. Eldridge
GREG S. ELDRIDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) ALFRED MILTON EVANS, an individual, and (2) SOUTHEASTERN OKLAHOMA FAMILY SERVICES. INC., a corporation,	)	
Plaintiffs,	)	
vs.	)	**Case No. CIV-01-252-HE (Consolidated Case Number)**
(1) MIKE FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority, (2) TERRI FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority, (3) DR. LYNN MITCHELL, in her individual capacity, as well as in her official capacity as State Medicaid Director for the Oklahoma Health Care Authority, (4) DANA BROWN, in her individual capacity, as well as in her official capacity as Legislative Liaison from the Oklahoma Health Care	)	

Authority, (5) JANA LEA WEBB, in her individual capacity, as well as in her official supervisory capacity on behalf of the Oklahoma Health Care Authority, (6) T.J. BRICKNER, JR., in his official capacity as Vice-Chairman of the Oklahoma Health Care Authority, (7) RONALD ROUNDS, O.D., in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (8) WAYNE HOFFMAN, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (9) JERRY HUMBLE, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (10) CHARLES ED McFALL, in his official capacity as Chairman of the Oklahoma Health Care Authority Board of Directors, (11) GEORGE MILLER, in his official capacity as a member of the Oklahoma Health Care Authority

Board of Directors,
(12) LYLE ROGGOW,
in his official capacity as
a member of the Oklahoma
Health Care Authority
Board of Directors, and
OKLAHOMA FOUNDATION
FOR MEDICAL QUALITY,
INC.,

Defendants.

and

(1) RUSTLING WINDS,
INC., an Oklahoma corpo-
ration, (2) TEN-KILLER
BEHAVIORAL SERVICES,
INC., an Oklahoma corpo-
ration, (3) MORNING
STAR MENTAL HEALTH
SERVICES, INC., an
Oklahoma corporation,
(4) DIVERSIFIED FAMILY
SERVICES, INC., an
Oklahoma corporation,
(5) SERENITY SPRINGS
MENTAL HEALTH SER-
VICES, L.L.C., an Okla-
homa limited liability
company, (6) JCH INCOR-
PORATED, an Oklahoma
corporation, (7) NORTH-
EAST OKLAHOMA, INC.,
an Oklahoma corporation,
(8) DAVETTA McINTOSH,
an individual, (9) NEAL

THRIFT, an individual, (10) NANCY GRAVES-THRIFT, an individual, (11) JOHN MAJORS, an individual, (12) CINDY MAJORS, an individual, (13) CHARLES PARKHURST, an individual, (14) MARY PARKHURST, an individual, (15) LEROY WHEELER, an individual, (16) EDNA KEATON, an individual, and (17) JOEL HOLCOMB, an individual,

Plaintiffs,

v.

(1) MIKE FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority, (2) TERRI FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority, (3) DR. LYNN MITCHELL, in her individual capacity, as well as in her official capacity as State Medicaid Director for the Oklahoma Health Care Authority,

Case No. CIV-01-557-HE

(4) DANA BROWN, in her individual capacity, as well as in her official capacity as Legislative Liaison from the Oklahoma Health Care Authority, (5) JANA LEA WEBB, in her individual capacity, as well as in her official supervisory capacity on behalf of the Oklahoma Health Care Authority, (6) T.J. BRICKNER, JR., in his official capacity as Vice-Chairman of the Oklahoma Health Care Authority, (7) RONALD ROUNDS, O.D., in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (8) WAYNE HOFFMAN, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (9) JERRY HUMBLE, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (10) CHARLES ED McFALL, in his official capacity as Chairman of the Oklahoma Health Care Authority

Board of Directors,
(11) GEORGE MILLER,
in his official capacity as
a member of the Oklahoma
Health Care Authority
Board of Directors,
(12) LYLE ROGGOW,
in his official capacity as
a member of the Oklahoma
Health Care Authority
Board of Directors, and
OKLAHOMA FOUNDATION
FOR MEDICAL QUALITY,
INC.,

Defendants.

STATE DEFENDANTS' ANSWER TO THIRD AMENDED COMPLAINT

(Filed Jul. 17, 2002)

1. Defendants Mike Fogarty, Terri Fritz, Dr. Lynn Mitchell, Dana Brown, Jana Lea Webb, T.J. Brickner, Jr., Ronald Rounds, O.D., Wayne Hoffman, Jerry Humble, Charles Ed McFall, Wayne Hoffman, George Miller, and Lyle Roggow (State Defendants hereafter) deny each and every allegation in Plaintiffs' Third Amended Complaint (Complaint) except as specifically admitted herein.

2. State Defendants admit this action is brought pursuant to 42 USC § 1983 but deny the remaining allegations in Complaint ¶ 1.

3. State Defendants admit Complaint ¶¶ 3, 4, 5, 7, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 24, and 31.

4. State Defendants are without knowledge or information sufficient to admit or deny Complaint ¶¶ 6, 33, 34, 38, and 39 and therefore deny the same.

5. Complaint ¶ 8 requires no response.

6. State Defendants admit Dana Brown is an Oklahoma resident employed by the Oklahoma Health Care Authority (OHCA) as a Governmental Relations Director but deny the remaining allegations in Complaint ¶ 12.

7. State Defendants admit Jana Lea Webb is an Oklahoma resident employed by OHCA as Supervisor of the Surveillance Utilization and Review Subsystem but deny the remaining allegations in Complaint ¶ 13.

8. State Defendants admit this action is brought against Fogarty, Fritz, Mitchell, Brown and Webb in their individual and official capacities and that they acted under color of state law but deny the remaining allegations in Complaint ¶ 14.

9. The Oklahoma Foundation for Medical Quality, Inc. (OFMQ) has been dismissed from this action; therefore, State Defendants deny Complaint ¶ 23.

10. Complaint ¶¶ 28, 29, 30, and 66 are statements of law to which no response is required.

11. State Defendants admit Plaintiff Milton Evans lobbied the Oklahoma Legislature but are without sufficient knowledge or information to admit or deny the remaining allegations in Complaint ¶ 35 and therefore deny the same.

12. State Defendants admit the Medicaid contract of Texoma Mental Health Services, Inc., was not renewed beyond thirty days but deny the remaining allegations in Complaint ¶ 36.

13. State Defendants admit OHCA notified Plaintiff Southeastern Oklahoma Family Services, Inc., that its Medicaid contract would be terminated pursuant to the contract's without cause termination procedures. State Defendants deny the remaining allegations in Complaint ¶ 43.

14. Defendants Fogarty, Mitchell, Fritz, Brown and Webb deny they denied reimbursement of any kind to Plaintiffs. Defendants Brickner, Rounds, Hoffman, Humble, McFall, Miller, Roggow admit that acting as the OHCA Board of Directors they do not reimburse private providers of behavioral health services at a greater rate than Community Mental Health Centers. State Defendants deny the remaining allegations in Complaint ¶ 44.

15. State Defendants admit private providers of behavioral health services are paid only for those services approved for Medicaid recipients prior to the giving of services. State Defendants deny the remaining allegations in Complaint ¶ 56.

AFFIRMATIVE DEFENSES

1. Plaintiffs fail to state a cause of action for which relief may be granted.
2. State Defendants have immunity from liability for the actions alleged.
3. The actions are barred by the statute of limitations.
4. Damages are not available from the State Defendants named in their official capacities because they are not persons.
5. Damages from the State Defendants named in their individual capacities are limited by 42 USC § 1981a.
6. The actions are barred by the doctrine of estoppel.

Respectfully Submitted,

/s/ Andrew Tevington
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Attorney for State Defendants

CERTIFICATE OF MAILING

On this 17th day of July, 2002, the undersigned caused the above and foregoing document to be placed in the U.S. Mail, postage prepaid, and addressed to:

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Michael S. Ashworth
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/s/ Andrew Tevington
Andrew Tevington

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ALFRED MILTON EVANS, an individual, and SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC., a corporation,

and

DOTTIE R., an individual, TOMMY W., an individual, RHONDA C., an individual, OLIVE D., as an individual and as legal guardian to ELIZABETH E., BRIAN E. and DOUGLAS E., as well as all those similarly situated,

Plaintiffs,

vs.

MIKE FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority, TERRI FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority, DR. LYNN MITCHELL, in his individual capacity, as well as in his official capacity as State Medicaid Director for the Oklahoma Health Care Authority, DANA BROWN,

Case No. CIV-01-252-W

in her individual capacity, as well as in her official capacity as Legislative Liaison from the Oklahoma Health Care Authority, T.J. BRICKNER, JR. in his official capacity as Vice-Chairman of the Oklahoma Health Care Authority, RONALD ROUNDS, O.D., in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, WAYNE HOFFMAN, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, JERRY HUMBLE, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors, CHARLES ED McFALL, in his official capacity as Chairman of the Oklahoma Health Care Authority Board of Directors, GEORGE MILLER, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors, and LYLE ROGGOW, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors,

Defendants.

ORDER

(Filed Feb. 12, 2001)

I. Introduction

Before the Court is Plaintiffs' Application for Temporary Restraining Order and Temporary Injunction filed on February 6, 2001. Defendants oppose the motion and filed a response brief on February 8, 2001. The Court held a hearing on the motion for temporary restraining order on February 8-9, 2001. All parties to the suit were represented by counsel at the hearing.

The plaintiffs in this case are of two types. It appears the primary plaintiffs ("plaintiffs") in this matter are Alfred M. Evans and Southeastern Oklahoma Family Services, Inc. ("SOFS"). SOFS is a provider of mental health care in southeastern Oklahoma. The secondary plaintiffs ("class") appear to be patients of SOFS that would be harmed if defendants' alleged conduct continues.

The defendant is, in essence, the Oklahoma Health Care Authority ("HCA"). Plaintiffs are suing certain HCA's officers (in their individual and official capacities) and the board of directors (in their official capacities only). The HCA is responsible for the disbursement of Medicaid funds to state-run, or state-contracted, Medicaid facilities.

Plaintiffs claim they have been subject to arbitrary and capricious actions by the defendants. Specifically, plaintiffs claim that due to Evans and

SOFS's open criticism of the current Medicaid system, SOFS has been subject to actions such as:

1. the use of abusive auditing tactics;
2. restriction of SOFS's cash flow trough [sic] arbitrary denials of reimbursement;
3. the exertion of improper influence over Medicaid reimbursement plans;
4. arbitrary delays in providing undisputedly appropriate reimbursements, and
5. denial of reasonable and adequate reimbursement rates.

As a result of these actions, plaintiffs assert six causes of action. Plaintiffs claim defendants' actions 1) violate their First Amendment rights, 2) violate their due process rights, 3) violate the Boren Amendment guarantees of reasonable and adequate reimbursements under the Medicaid program, 4) violate the Boren Amendment guarantees of reasonable access to and adequate quality of Medicaid services, 5) violate the Medicaid Act's guarantee of medical services that are of sufficient amount, duration, and scope, and 5) violate 42 U.S.C. § 6009 guarantees of appropriate treatment, services, and habilitation for disabled persons.

Defendants deny the allegations and submit that their actions have been neither arbitrary, nor capricious. They contend that the actions were legitimately taken to enforce state and federal regulations

and to ensure the well-being of the mentally ill population in southeastern Oklahoma.

II. Background

The dispute between the parties arises from the complex relationship between the parties to this suit. Plaintiff Alfred M. Evans previously owned Texoma Mental Health Services ("Texoma"), a Medicaid mental health provider in southeastern Oklahoma. Mr. Evans, is a vocal critic of Oklahoma's current system of Medicaid funding. He has lobbied various government officials, including the Governor and various state legislators, to provide greater funding for private medical care providers in the state. As a result of his and others' efforts, the State appropriated additional funding for state supported, privatized medical care. According to plaintiffs, due to Evans' crusade for Medicaid reform in Oklahoma, defendants terminated the State's Medicaid contract with Texoma.

Defendants deny that Texoma's contract was terminated as a result of Evans' political activities. Rather, defendants contend, Texoma's contract was cancelled as a result of substantial billing irregularities that were uncovered through the HCA auditing process.

Without Medicaid reimbursement funds, Texoma entered into bankruptcy. In an effort to continue services, Evans started SOFS, a new non-profit mental health company. In order to keep his involvement with

SOFS from the defendants, Evans is not directly affiliated with SOFS but rather works as a consultant.

SOF began operations in the summer of 2000. Within a few months of Texoma's bankruptcy filing, substantially all of Texoma's personnel and client base transferred to SOFS. SOFS offered medical services throughout southeastern Oklahoma with offices in Hugo, Durant, and Ardmore. SOFS serves approximately 740 mentally ill individuals in a 10 county area.

The HCA conducted an audit of SOFS's Hugo facility on October 19, 2000. During that audit, certain records were inspected and cataloged. While complete findings were not issued at that time, the auditors notified SOFS officials that various violations were taking place.

Evans continued his efforts on behalf of Medicaid reform by filing an Oklahoma Open Records Act request on November 22, 2000. In it, Evans sought detailed information on the RCA's spending and administrative practices. Two business days later, on November 28, 2000, SOFS's Ardmore facility was the subject of an audit conducted by the HCA. Once again complete findings were not made on site, but the auditors noted various violations of HCA policy. Plaintiffs claim, however, that the exit interview with the HCA auditors was very positive and complimentary. The auditors apparently made "commendations" and were helpful in devising solutions to the apparent

deficiencies. On December 4, 2000, the HCA sent a letter to Evans informing him that his Oklahoma Open Records Act request would be expensive, and that Evans would be responsible for bearing the cost. The letter also gave Evans an opportunity to withdraw his request. Evans declined and informed the HCA of his intention to proceed with the request on December 19, 2000.

The HCA released the full results of the Hugo audit on December 14, 2000, the results of the Ardmore audit followed on the same day Evans renewed his records act request – December 19, 2000. Both audits revealed deficiencies in SOFS's performance and the State sought recoupment of funds in both cases. In each report, SOFS was notified both of its right to appeal, the findings, and of the proper procedure for pursuing an appeal.

Having received no response to his open records request by the end of December, Evans again sought the information in early January, 2001. At that time, discussions with the HCA revealed an apparent miscommunication; Evans was informed that his renewed request had not been received but that it was now going forward. On January 8, 2001, the HCA. notified SOFS of its cancellation of SOFS's Medicaid contracts; while the letter mentioned "serious deficiencies" in SOFS's performance, the HCA chose to terminate the contract without cause. Immediately following the termination letter, the HCA notified SOFS that it was being placed on "on review" status. This "on review" status apparently requires SOFS to

submit all its billing manually rather than through the electronic system normally used.

Negotiations between the parties continued and on January 19, 2001, after a meeting with state representative Randal Erwin, the HCA chose to temporarily suspend the termination of SOFS's Medicaid contracts. Currently, the Medicaid contracts are continuing, but SOFS is required to manually submit all of its billings.

III. Legal Standards

Plaintiffs' motion for a temporary restraining order seeks to maintain what they call the "anti-status quo." In essence, plaintiffs seek to have this Court order the defendants to reinstate plaintiffs' automatic billing privileges and keep the contract termination in abeyance until after a full hearing on the merits of this case.

When the party opposing a motion for a temporary restraining order actually receives notices of the application, the procedure that is followed does not functionally differ from that on an application for a preliminary injunction. *TLX Acquisition Corp. v. Telex Corp.*, 679 F. Supp. 1022, 1028 (W.D. Okla. 1987); see also WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: Civil 2d §2951. When the opposing party has an opportunity to be heard at the TRO hearing, the court may properly treat the motion as one for a preliminary injunction. *Levas & Levas v. Village of Antioch, Illinois*, 684 F.2d 446, 448 (7th Cir.

1982). When all parties have notice and appear at a hearing, the higher showing contemplated by the TRO provisions of FED.R.CIV.P. 65(b) is not necessary. *Id.*

In order to merit a preliminary injunction, plaintiffs must establish that: (1) they have a substantial likelihood of prevailing on the merits; (2) they will suffer irreparable injury if they are denied the injunction; (3) its threatened injury outweighs the injury that the opposing party will suffer under the injunction; and (4) an injunction would not be adverse to the public interest. *Autoskill, Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1487 (10th Cir.) (citation omitted), *cert. denied,* 510 U.S. 916 (1993).

Plaintiffs must make a heightened showing because they request the Court to command defendants to alter the status quo by returning plaintiffs to an automatic billing system. When plaintiffs seek such a preliminary mandatory injunction, they must meet a higher standard than if they were simply trying to maintain the status quo. *Malkentzos v. DeBuono,* 102, F.3d 50, 54 (2nd Cir. 1996). Because of the heightened requirement for affirmative action, plaintiffs must demonstrate that the preliminary mandatory injunction weighs heavily in their favor.

IV. Analysis

Likelihood of Prevailing on the Merits

Plaintiffs bring six causes of action in the present suit. Specifically, plaintiffs assert that defendants' retributive actions 1) constitute a prior restraint on speech in violation of the First Amendment, 2) violate plaintiffs' due process rights by breeching [sic] the implied covenant of good faith in the Medicaid contracts, 3) violate the rights to reasonable and adequate reimbursement for services afforded by the Boren Amendment, 42 U.S.C. § 1396(a)(a)(13)(A), 4) violate the right of reasonable access to medical care for patients under the Boren amendment, 5) violate patients' rights to adequate amount, duration, and scope of care afforded by the Medicaid Act's implementing regulations, 42 C.F.R. § 440.230, and 6) violate patients' rights to appropriate treatment, services, and habilitation for disabilities pursuant to 42 U.S.C. § 6009. Plaintiffs bears [sic] the burden of proving they are likely to succeed on these claims.

First Amendment Claim

In the view of the Court, the plaintiffs have shown a substantial likelihood of success on the merits of their First Amendment Claim. The core of plaintiffs' claim is that defendants have retaliated against them because of Evans' lobbying and other political activities. Retaliation for the exercise of First Amendment rights is an accepted cause of action. *See Board of County Commissioners, Wabaunsee County,*

Kansas v. Umbehr, 518 U.S. 668 (1996). In the present case, the evidence presented during the hearing demonstrates an uncanny correlation, between Evans' exercise of free speech rights and administrative actions taken by the HCA.

When Evans opposed the HCA by lobbying the legislature for additional funding his predecessor company, Texoma, lost its Medicaid contract. When Evans submitted an Oklahoma Open Record Act request to the HCA, the HCA instituted an audit of SOFS's Ardmore facility two business days later. While some discrepancies were found, the overall tone or the audit was positive; Dr. Baumberger testified that the auditors were complimentary and gave numerous commendations to the SOFS staff.

To further add to the series of coincidences, the HCA contacted Evans and gave him an opportunity to withdraw his open records act request a few days after the audit. In addition, on December 19, 2000, the day Evans renewed his request for information, the HCA released the audit report that harshly criticized SOFS's Ardmore facility even though the auditors had been very complimentary during their exit interview.

The series of coincidences continued into January 2001. The HCA claims to have misplaced Evans' information request. Evans again renewed his request on January 3, 2001 and on January 8, 2001, SOFS received notice that the HCA was terminating

all of SOFS's Medicaid contracts. This letter was followed by notice that SOFS was being put on an "on review" status mandating manual billing procedures on January 10, 2001.

In an attempt to negotiate a compromise with the HCA, plaintiffs again met with HCA officials on January 19, 2001. This time, the meeting was in the presence of State Representative Randall Erwin. At this Meeting, the evidence appears to show that the HCA's legislative liaison, Dana Brown, made disparaging remarks regarding Evans and SOFS. Testimony from both Dr. Baumberger and Mr. Evans shows that HCA was aware of Evans' involvement with SOFS and Texoma. Ms. Brown's comments indicated that she believed Evans to be "playing games" with the HCA and that it would not be tolerated. Plaintiffs contend the timing correlation between Evans' political actions and HCA administrative actions shows that HCA was retaliating against Evans and SOFS. Their claim is further bolstered by the evidence showing Ms. Brown held a very negative view of Mr. Evans and the companies he was associated with.

The defendants claim the timing of these events is purely coincidental. They presented evidence to show that the audit system is semi-independent of the HCA. Jana Webb, the supervisor of the Surveillance Utilization and Review System (SURS), testified at the hearing that SURS is completely responsible for auditing Medicaid providers. She also testified that she had no knowledge of Evans'

information request and that she instituted the SOFS audits of her own accord. She further testified that she made the recommendation to terminate the SOFS contracts and to place them on an "on review" status based solely upon her audit findings.

Defendants do not deny that Ms. Webb should have been notified if Mr. Evans' information request was being properly processed. Since the information request specifically sought information from Ms. Webb's department, she should have been informed of Evans' information request. Defendants also do not deny that the complaints that supposedly caused Ms. Webb to instigate the SOFS audits were made by persons fired from SOFS. Defendants merely claim the information in the complaints was proven credible when the audits revealed missing files.

SOFS is a relatively new corporation. Plaintiffs admit that some record keeping errors have occurred as the business has begun to grow and mature. However, rather than give plaintiffs adequate opportunity to correct the faulty procedures revealed during the audits, defendants terminated the Medicaid contracts less than one month after the audit reports were complete; they did not even leave enough time for the appeals process to be completed.[1]

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[1] After discussions with plaintiffs, the defendants have placed the contract termination in abeyance pending completion of the administrative appeal process.

The Court believes the plaintiffs have shown that they are likely to succeed in showing that the defendants took certain retaliatory administrative actions in response to the exercise of First Amendment rights by Mr. Evans.

Due Process Claim

The Court believes that plaintiffs have shown a substantial likelihood of success on the merits with regard to their due process claim as well. From the discussion above, it appears that the HCA may have acted in bad faith in terminating SOFS's Medicaid contracts. Every commercial contract contains an implied covenant of good faith and fair dealing. 12A Okl.St.Ann. § 1-203. Because the plaintiffs have shown a substantial likelihood of success in showing defendants' bad faith, the Court finds there to be a substantial likelihood of success on plaintiffs' due process contract claim.

Statutory Claims

Plaintiffs assert four statutory claims based upon two statutes and one regulation. They claim rights guaranteed in the Boren Amendment, 42 U.S.C. § 1396(a)(a)(13)(A), the Medicaid Act's implementing regulations, 42 C.F.R. § 440.230, and the Medicaid Act itself, 42 U.S.C. § 6009, are all violated by defendants actions.

The Court finds that while some of plaintiffs claims in this regard may not be successful, they have shown a likelihood of success on the remainder of their claims. The Court notes that the Boren Amendment, 42 U.S.C. § 1396(a)(a)(13)(A) (1996), as relied upon by the plaintiffs was repealed in 1997 and replaced with a procedure for ensuring adequate input into the reimbursement rate determination process. 42 U.S.C. § 1396(a)(a)(13)(A) (2000).[2] The statute as cited by plaintiffs no longer guarantees a right of reasonable access to medical facilities.[3] Because their claims regarding adequate reimbursement and reasonable access to facilities are based on a partially repealed statute, the Court finds that, while plaintiffs may in fact prevail on these claims, they have not shown a substantial likelihood of success on the merits.

However, plaintiffs do make compelling arguments with respect to their other statutory claims. The rights guaranteed by 42 C.F.R. §440.230 and 42 U.S.C. § 6009[4] appear to be infringed by defendants

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[2] Plaintiffs presumably intend to pursue their claim to a "reasonable reimbursement" based upon the new language of 42 U.S.C. § 1396(a)(a)(13).

[3] Plaintiffs have notified the Court that while the language guaranteeing the right to reasonable access to medical services has been removed from 42 U.S.C. § 1396(a)(a)(13), it appears in 42 U.S.C. § 1396(a)(a)(10)(B). The Court presumes plaintiffs intend to proceed under this statute.

[4] The Court notes that 42 U.S.C. § 6009 was repealed by Act of October 30, 2000, Pub. L. No. 106-402 § 401. However, the

(Continued on following page)

actions. While there is some dispute as to the effects of terminating SOFS as a medical service provider, the Court believes defendants actions in terminating SOFS as a provider, without ensuring the availability of adequate replacement medical facilities (see irreparable harm analysis below), demonstrate a substantial likelihood of success with respect to some of plaintiffs' statutory claims.

Plaintiffs' Irreparable Injury

Plaintiffs claim a variety of irreparable harms will befall them if this Court refuses to issue a mandatory injunction. Plaintiffs claim that failure to issue an injunction will result in an unconstitutional prior restraint of free speech. They also claim that SOFS will be forced out of business, and that the patients currently served by SOFS will either go untreated or will receive inadequate care.

Harm to Evans

Prior restraints give rise to a heavy presumption of unconstitutionality. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). Plaintiffs have shown that they feel threatened by defendants' actions and that there is a substantial likelihood that their speech has been effectively chilled. Defendants simply deny any

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rights previously codified in 42 U.S.C. § 6009 are substantially reinstated in Pub. L. No. 106-402 § 109. The Court presumes the plaintiffs wish to bring their action under this section.

connection between Evans' political speech and their actions; therefore, they deny that any First Amendment right is at issue. If defendants' actions are chilling plaintiffs' speech, there is no doubt that plaintiffs will suffer irreparable harm if an injunction does not issue.

Harm to SOFS

Plaintiffs also claim that SOFS will be forced out of business should the Court decline to issue an injunction. Plaintiffs have provided evidence that, in their line of business, most organizations operate on a shoestring budget. Should their cash flow be disrupted for any length of time, they will not be able to continue operations. By placing SOFS on the "on review" manual billing system, the evidence shows that defendants have effectively slowed SOFS's cash flow to a trickle. The "on review" manual billing system requires that, for each medical procedure billed to the State, the plaintiffs must attach documentation proving that the procedure was, in fact, performed. While this system may seem benign, the evidence presented during the hearing shows that being placed on the "on review" system is a death sentence for virtually all providers placed on it. While defendants readily admit that numerous providers have been placed on "on review" status over the years, they are more reluctant to admit that no corporate medical provider placed on the list has ever

gotten off of it; they have all gone out of business.[5] The reasons that the manual system is a "death sentence" appear to be numerous. In order to even submit the billings to the state, clinicians' reports must be collected and attached to lengthy, complicated forms. Even well-trained personnel appear to have difficulty completing to [sic] forms. After they are sent to the state, the billings must be manually reviewed by SURS personnel and then approved by the HCA before being manually entered into the billing system. Even then, the computer may reject the claim for a variety of pre-determined rationale. The evidence shows that, at best, the turnaround time for a properly filed claim is two to three weeks. However, sometimes the delay may exceed a number of months. The "on review" system appears to be "an anvil that has worn out many a hammer."

Defendants claim that these harms to SOFS are not irreparable. They allege that all harms stated are merely economic and that if the plaintiffs prevail at trial, money damages will be sufficient to compensate them. However, the Court finds the precarious nature of plaintiffs' finances, coupled with the additional burden of the "on review" system clearly show that

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[5] Defendants claim that one corporate entity has survived the "on review" procedure. However, from the evidence presented, it appears this provider has not been removed from the "on review" status, but has merely survived for five months. In addition, it is unclear if this "surviving" provider serves a clientele similar to SOFS's.

SOFS will go out of business and lose personnel should injunctive relief be denied. Therefore, the Court finds that SOFS will suffer irreparable injury should the Court decline to grant injunctive relief.

Harm to Patients

While the Court believes that harm will befall both Evans and SOFS should injunctive relief be denied, failure to grant injunctive relief will cause the greatest amount of harm to the mentally ill patients served by SOFS. The evidence shows that SOFS is one of the few providers willing and able to care for the chronically ill mental patients in southeastern Oklahoma. Many of the chronic patients that SOFS serves have been turned down by other mental service providers in the region. One of the doctors employed with SOFS, Dr. Baumberger, characterized SOFS as the provider of last resort for hundreds of chronic mental patients.

In addition, the evidence presented during the hearing shows that southeastern Oklahoma has an unusually high need for mental health services. Another doctor employed with SOFS, Dr. Foster, testified that there is an unusually high incidence of inter-generational mental problems in the area. In addition, due to the poverty of the region, many patients do not have the necessary transportation to travel to medical providers. SOFS is one of the few providers that offer in-home care for a number of its patients.

Most convincingly, plaintiffs showed that there are simply not enough facilities in the region to absorb the patient load if SOFS were suddenly forced out of business. SOFS serves approximately 740 patients. Of those patients, testimony showed that roughly 80% are chronically ill and extremely difficult to place elsewhere. In addition, a significant number of patients served by SOFS are children. Testimony showed that other facilities are generally not equipped or staffed to deal with the special needs of mentally ill children. While defendants claim that roughly ten other mental facilities stand ready to accept those that [sic] displaced should SOFS close down, they did not counter plaintiffs' evidence that, at best, 20% of SOFS's patients could be transferred, leaving many children and the chronically ill to fend for themselves.

Plaintiffs also produced convincing evidence that, even if places could be found at other providers, such a sudden change would likely cause irreparable damage to many of the patient population. The testimony also showed that unless a proper transition could be made, some patients will suffer from separation anxiety or abandonment. In many cases, this anxiety would result in the need for hospitalization. An abrupt closing of SOFS would not provide patients an adequate transition period.

Defendants deny that patients will suffer any harm from the closing of SOFS. They simply point to ten different agencies in the geographic region that accept Medicaid and claim that the patients will be

cared for. They did not dispute Dr. Foster's predictions of numerous patient hospitalizations should SOFS close, nor did they dispute his claim that the chronically ill would go uncared for.

While they do not adequately refute plaintiffs' evidence showing the irreparable harm that would result from SOFS's closure, defendants claim that patients will suffer greater harm if SOFS is allowed to remain open. They point to the lack of documentation revealed by the audits and infer that many patients are receiving inadequate care at SOFS. The defendants believe that documentation is inextricably linked to the care given. However, the defendants were not able to prove that a single patient had not received adequate care at SOFS. The Court agrees with Dr. Baumberger that while proper documentation is important, the level of care provided is more important than the level of documentation recorded.

Balance of Harms

As detailed above, the plaintiffs will suffer a number of harms should this Court refuse injunctive relief. Plaintiff Evans will suffer an arguably unconstitutional prior restraint of speech, SOFS will likely be forced to cease business operations, and the mentally ill in southeastern Oklahoma will be without an invaluable resource. Many of the patients will not be accepted elsewhere and their condition will deteriorate. Clearly, the harms that will be suffered by the plaintiffs are great.

The question remaining is what harm will the defendants suffer should this Court choose to grant injunctive relief? The harm to the defendants resulting from a mandatory injunction appears to be slight. The defendants claim that they have a duty to the state to ensure that Medicaid procedures are properly documented and performed. In essence, this amounts to a duty to protect the public treasury. The Court finds however, that even if an injunction mandating plaintiffs' return to electronic billing is issued, the defendants should be adequately protected. The defendants' right to conduct audits and recoup monies would be unaffected. In addition, plaintiffs would be required to post a surety as required by FED.R.CIV.P. 65(c). As a final protection against improper billing, plaintiffs have agreed to submit progress notes to ensure the HCA receives proper documentation for claims.

Nevertheless, defendants claim that monies that might somehow be improperly paid to plaintiffs would deprive other patients in the State of proper medical care. The Court shares defendants' concern for the Medicaid recipients in Oklahoma but finds the protections against improper billing to be adequate to protect the public treasury. Therefore, the Court finds the potential harm to the plaintiffs significantly outweighs the potential harm suffered by the defendants.

Public Interest

The final factor to consider is the effect of injunctive relief on the public. Once again, the Court finds the factor weighs in favor of granting injunctive relief. The plaintiffs have provided the Court with ample evidence in the form of affidavits and testimony that the public will be better served if SOFS remains in business pending the outcome of a trial on the merits.

Plaintiffs have produced evidence to show that the demise of SOFS would cause an increased burden on law enforcement in the region. Because law enforcement is required to respond to every disturbance, even a small increase in the number of mentally unstable people in the general populace would stretch current law enforcement resources beyond their capacity.

In addition, the sudden closure of SOFS would hurt the community as a whole. As the evidence has demonstrated, many individuals currently receiving care from SOFS would suddenly be without. Because many of these individuals are dangerous to themselves and others if their conditions are not properly treated, a failure to obtain care could have significant repercussions.

Defendants counter these arguments by stating that the patients will receive better care at other facilities. Unfortunately, as discussed above, defendants are unable to show the Court that these [sic] many of these displaced patients will receive any care,

much less better care. Therefore, the Court finds that the public interest is better served by the issuance of a mandatory injunction.

V. Conclusion

As detailed above, plaintiffs have showed that each of the four injunctive factors weigh in their favor. While plaintiffs may not succeed on every claim they assert, they have shown a substantial likelihood of success on the merits for the majority of asserted claims. They have also shown that they will suffer irreparable harm should injunctive relief be denied, that the balance of harms weighs substantially in their favor, and that the public interest is best served by the granting of an injunction. In addition, the Court finds the plaintiffs have met the heightened burden required for the granting of a preliminary mandatory injunction. Therefore, for the reasons set forth more fully above, the Court:

1. GRANTS plaintiffs' motion for a preliminary mandatory injunction; and
2. ORDERS defendants to return SOFS to the automated billing procedure; and
3. ORDERS plaintiffs to timely submit to HCA all documentation that would be required under a manual billing system; and
4. ORDERS defendants to hold the termination of SOFS's Medicaid contracts in

abeyance pending an outcome on the merits of the present suit; and

5. ORDERS plaintiffs to post a bond in the amount of $40,000 pursuant to FED.R.CIV.P. 65(c).

ENTERED this 12th day of February, 2001.

/s/ Lee R. West
LEE R. WEST
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ALFRED MILTON EVANS, an individual; SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC., a corporation,

Plaintiffs-Appellees,

v.

MIKE FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority; TERRIE FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority; DANA BROWN, in her individual capacity, as well as in her official capacity as Legislative Liaison from the Oklahoma Health Care Authority,

Defendants-Appellants,

and

DR. LYNN MITCHELL, in his individual capacity, as well as in his official capacity

No. 04-6007

(W.D. Oklahoma)

(D.C. No. 01-CV-252-H)

as State Medicaid Director for the Oklahoma Health Care Authority; T.J. BRICKNER, JR., in his official capacity as Vice-Chairman for the Oklahoma Health Care Authority; RONALD ROUNDS, O.D., in his official capacity as member of the Oklahoma Health Care Authority Board of Directors; WAYNE HOFFMAN, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors; JERRY HUMBLE, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors; CHARLES ED McFALL, in his official capacity as Chairman of the Oklahoma Health Care Authority Board of Directors; GEORGE MILLER, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors; LYLE ROGGOW, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors,

Defendants.

ORDER AND JUDGMENT*

(Filed Jan. 26, 2005)

Before **KELLY**, **ANDERSON**, and **O'BRIEN**, Circuit Judges.

Defendants Mike Fogarty, Terrie Fritz and Dana Brown, employees of the Oklahoma Health Care Authority ("OHCA"), seek an interlocutory appeal of the district court's order denying their request to file a third motion for summary judgment asserting that they are entitled to qualified immunity from plaintiffs' 42 U.S.C. § 1983 lawsuit. For the reasons that follow, we conclude we lack jurisdiction over this appeal and dismiss it.

Plaintiffs, Alfred Milton Evans, the Southeastern Oklahoma Family Services, Inc. ("SOFS"), providers of mental health care in southeastern Oklahoma, as well as some SOFS patients, brought this § 1983 action against defendants and others,[1] alleging, *inter alia*, that their First Amendment rights were violated

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] The remaining defendants were all connected to OHCA in various capacities.

when defendants retaliated against them for speaking publicly about various issues affecting Oklahoma's Medicaid system.

The resolution of this appeal requires a general understanding of the lengthy history of this litigation: Plaintiffs initially successfully obtained a preliminary injunction against defendants barring them from continuing to violate plaintiffs' constitutional rights. Defendants first raised the defense of qualified immunity in their answer to plaintiffs' third amended complaint. Appellants' App. at 56-63. They then filed a motion to dismiss based on qualified immunity. Appellees' App. to Mot. to Dismiss at tab 3. The district court denied defendants' motion to dismiss and defendants did not attempt to appeal.

Defendants then filed a motion for summary judgment on various grounds with no mention of a defense of qualified immunity. They subsequently withdrew the motion. Defendants thereafter filed eight further separate motions for summary judgment against plaintiffs. None of those motions raised the defense of qualified immunity either. The court denied these motions and defendants did not attempt an appeal.

The parties subsequently filed a joint pretrial report which also failed to raise a defense of qualified immunity. A five-day trial in April 2003 resulted in a jury verdict in favor of plaintiffs. Defendants did not raise the issue of qualified immunity in any of their trial or post-trial motions.

However, for reasons not relevant here, the district court later granted defendants' motion for a new trial. Prior to this second trial, defendants sought permission from the district court to file yet another motion for summary judgment seeking to raise specifically the defense of qualified immunity. The district court denied the request, stating as follows:

> To the extent defendants seek leave to assert a qualified immunity defense by summary judgment motions to be filed, their motion is DENIED. This case has already gone to trial once. The pretrial order entered in the case did not preserve or assert the defense of qualified immunity. While a second trial need not necessarily involve the same witnesses and proof, the Court concludes it is inappropriate, in the circumstances of this case, to permit defendants to raise new and different legal issues or defenses not at issue in the first trial.

Order, Appellees' App. to Mot. to Dismiss at tab 11.

Defendants seek to effect an appeal of that order denying them permission to file another motion for summary judgment asserting the defense of qualified immunity. They argue the order is tantamount to a final decision denying them the defense of qualified immunity and, as such, is appealable on an interlocutory basis under *Mitchell v. Forsyth,* 472 U.S. 511 (1985).

Meanwhile, the case has been fully tried to a conclusion for the second time, resulting again in a

jury verdict adverse to defendants. In the second trial, as both parties concede, defendants were able to raise a defense of qualified immunity. Indeed, they concede that the issue was included in the pretrial order and was the subject of extensive Fed. R. Civ. P. 50 written submissions, which apparently remain pending before the district court.[2]

Plaintiffs seek dismissal of this appeal for lack of appellate jurisdiction. We agree with plaintiffs. While the denial of qualified immunity can be an appealable collateral order, *see Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *Mitchell*, 472 U.S. at 526, the district court's order in this case did not address any qualified immunity issue. It was simply a pretrial order denying defendants' request to file a motion. *See Edwards v. Cass County*, 919 F.2d 273 (5th Cir. 1990). Defendants will have a full opportunity to address any properly preserved qualified immunity issue on appeal from the adverse jury verdict reached in, and any adverse post-trial rulings with respect to, the second trial. Defendants' assertion that they are somehow prejudiced by our refusal to hear this interlocutory appeal because they will otherwise be required to post a bond in order to gain review of their qualified immunity defense is unavailing. It does not transform an otherwise unappealable

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[2] Although the defendants sought to effect this interlocutory appeal prior to the conclusion of the second trial, we permitted the trial to proceed based upon the district court's certification that the appeal was frivolous and not taken in good faith.

order into an appealable one, and it does not serve the core purpose for an interlocutory appeal set out in *Mitchell*. To the contrary, any remand for proceedings on the summary judgment motion at this late date will add both delay and expense, and, at best, probably only postpone the time when an appeal bond will have to be posted. Thus, as a practical matter, the attempted appeal is effectively moot.

Accordingly, in the peculiar circumstances of this case, we lack jurisdiction to review on an interlocutory basis the district court's order denying defendants permission to file a motion for summary judgment. Appeal DISMISSED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ALFRED MILTON EVANS, ET AL.,	)	
Plaintiffs,	)	NO. CIV-01-0252-HE (Consolidated Number)
vs.	)	
MIKE FOGARTY, ET AL.,	)	
Defendants.	)	

ORDER

Defendants Fogarty, Fritz and Brown have filed their combined motions seeking leave to file summary judgment motions based on qualified immunity and other relief. Plaintiffs have responded in opposition.

To the extent defendants seek leave to assert a qualified immunity defense by summary judgment motions to be filed, their motion is **DENIED**. This case has already gone to trial once. The pretrial order entered in the case did not preserve or assert the defense of qualified immunity. While a second trial need not necessarily involve the same witnesses and proof, the Court concludes it is inappropriate, in the circumstances of this case, to permit defendants to raise new and different legal issues or defenses not at issue in the first trial.

Defendants' motions, insofar as they seek leave to file supplemental motions in limine, are **GRANTED**. Deadlines for the submission of such motions, by any

party, will be determined later. The Court will determine the need for a scheduling conference and/or the schedule to be observed in connection with the retrial after the filing of the proposed revised pretrial report and briefs referenced in the Court's October 16, 2003, order.[1]

IT IS SO ORDERED.

Dated this 3rd day of December, 2003.

/s/ Joe Heaton
JOE HEATON
UNITED STATES DISTRICT JUDGE

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[1] *The parties should address the matter of any supplemental motions in limine in their discussions leading to submission of the revised pretrial report and, if agreement can be reached, reflect those agreements in the proposed pretrial report.*

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ALFRED MILTON EVANS, et al.,	)	
Plaintiffs,	)	Case No. CIV-01-252-HE
vs.	)	(Consolidated Number)
MIKE FOGARTY, et al.,	)	
Defendants.	)	

JOINT AND COMBINED MOTIONS BY DEFENDANTS FOGARTY, FRITZ AND BROWN FOR LEAVE TO FILE MOTIONS FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY AND MOTIONS IN LIMINE AND TO SET SCHEDULING CONFERENCE AND SUPPORTING BRIEF

(Filed Nov. 12, 2003)

Defendants Mike Fogarty, Terri Fritz and Dana Brown move the Court for an Order allowing leave (1) to file motions for summary judgment based on qualified immunity (2) to file motions in limine and (3) to set a scheduling conference. In support thereof, Defendants state:

Introduction

The Court has "broad discretion in its control and management of [a second] trial." *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1450 (10th Cir. 1993). In streamlining the conduct of the second trial, the

Court retains "broad latitude and may with proper notice allow additional witnesses and relevant proof." *Id.* "Technical rulings should never preclude . . . material proofs; [instead] common sense should control." *Id.* Moreover, the Court should be governed by its need for judicial management and the requirements of basic fairness to the parties in the new trial. *Id.*

For the reasons stated herein, Defendants should be allowed to file motions for summary judgment based on qualified immunity. They should also be allowed to file motions in limine. Additionally, a scheduling conference to discuss schedules of the court and the various counsel involved and to determine all necessary deadlines would be appropriate.

Defendants Should Be Given Leave To File Motions For Summary Judgment On Qualified Immunity.

Defendants should be allowed to file motions for summary judgment that would argue that these defendants are immune from suit under the doctrine of qualified immunity. Each of these defendants asserted qualified immunity in their answer to the Third Amended Complaint and in motions to dismiss. However, for reasons unknown to defendants' current counsel, the issue was omitted from the motions for summary judgment previously filed on defendants' behalf and from the pretrial order.

To benefit from qualified immunity, defendants must, of course raise the defense. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). There are, however, several ways to raise the defense. Defendants may raise qualified immunity in their answer, or in a motion to dismiss or a motion for summary judgment. *Quezada v. County or* [sic] *Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991), quoting *Pueblo Neighborhood Health Ctrs. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988). "Defendants who are unsuccessful in having a lawsuit dismissed on qualified immunity grounds before trial may reassert the defense at trial or after trial." *Quezada, supra*; *see also Mick v. Brewer*, 76 F.3d 1127 (10th Cir. 1996) (same); *Dixon v. Richer*, 922 F.2d 1456, 1463 (10th Cir.1991) (same).

Of course, a defendant has the initial burden of raising qualified immunity. However, once qualified immunity is raised, the burden shifts to the plaintiff to show that the particular defendant's conduct violated the law and that the relevant law was clearly established. *The Gehl Group v. Koby*, 63 F.3d 1528 (10th Cir. 1995); *Adkins v. Rodriguez*, 59 F.3d 1034 (10th Cir. 1995); *Thompson v. City of Lawrence*, 58 F.3d 1511 (10th Cir. 1995); *Romero v. Board of Cty. Comm'rs. of Cty. of Lake*, 60 F.3d 702 (10th Cir. 1995).

Under qualified immunity, government officials are not subject to damages liability for the performance of their discretionary functions when the law was not clearly established. *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). A plaintiff initially bears a heavy two part burden once a defendant pleads qualified

immunity. A "plaintiff must show (1) 'that the defendant's actions violated a constitutional or statutory right,' and (2) that the right 'allegedly violated [was] clearly established at the time of the conduct at issue.'" *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir.1995). *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996). A plaintiff must then "articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity." *Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir.1995). Unless the plaintiff carries its twofold burden, the defendant prevails. *Pueblo Neighborhood Health Ctrs.*, 847 F.2d at 646.

Qualified immunity is an extremely important right of a public official. It is an entitlement not to stand trial or face the other burdens of litigation. *Verdecia v. Adams*, 327 F.3d 1171, 1174 (10th Cir. 2003); *Roska v. Peterson*, 304 F.3d 982, 989 (10th Cir. 2002). The doctrine of qualified immunity is a recognition of the fact that "even where personal liability does not ultimately materialize, the mere 'specter of liability' may inhibit public officials in the discharge of their duties." *Atwater v. City of Lugo Vista*, 532 U.S. 318, 351 n.22 (2001). The purpose of qualified immunity is to allow officials to take action "'with independence and without fear of consequences.'" *Schwenk v. Hartford*, 204 F.3d 1187, 1198 (9th Cir. 2000). A defendant who has lost his right not to stand trial can reassert his qualified immunity claims at and after trial when the factual issues have been

resolved. *Gossett v. State ex rel. Board of Regents*, 245 F.3d 1172, 1181 n.5 (10th Cir. 2001).

Given the important public policy embodied in the doctrine of qualified immunity, and given the judicial presumption that such immunity protects public officials from suit, defendants request that they be afforded the opportunity to demonstrate to this Court that they are immune from suit.

Defendants Should Be Permitted To File Motions In Limine.

Defendants also request permission to file motions in limine that would seek the exclusion of irrelevant, prejudicial, cumulative and unreliable testimony, exhibits and arguments that were presented by the plaintiffs in the first trial of this matter.

Based on their review of the trial transcripts, defendants believe that a considerable amount of trial time was devoted to matters which court orders in limine would properly restrict. For example, it would plainly be improper at a second trial to refer either to Judge West's order at the preliminary injunction hearing or to refer to the results of the first trial. Moreover, given the disposition of other aspects of this case, such as the dismissal of other defendants, reference to matters that were relevant to those claims should be excluded. Without arguing the merits of such potential motions, Defendants believe the second trial will be both fairer and shorter if the court has an opportunity to consider certain motions

in limine. *See* Fed. R. Evid. 103(c) (in jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury).

Motion to Set Scheduling Conference.

Defendants request that the Court set a scheduling/status conference, to discuss a schedule regarding the above-requested motions, the date of the new trial and, if appropriate, other matters.

Respectfully submitted,

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CERTIFICATE OF MAILING

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA**

(1) ALFRED MILTON EVANS, an individual, and (2) SOUTHEASTERN OKLAHOMA FAMILY SERVICES. INC., a corporation,

and,

(3) DOTTIE R., an individual, (4) TOMMY W., an individual, (5) RHONDA C., an individual, (6) OLIVE D, as an individual and as legal guardian to (7) ELIZABETH E., (8) BRIAN E., and (9) DOUGLAS E., as well as all those similarly situated,

Plaintiffs,

vs.

(1) MIKE FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority, (2) TERRI FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority, (3) DR. LYNN MITCHELL,

Case No. CIV-01-252-W

in her individual capacity, as well as in her official capacity as State Medicaid Director for the Oklahoma Health Care Authority, (4) DANA BROWN, in her individual capacity, as well as in her official capacity as Legislative Liaison from the Oklahoma Health Care Authority, (5) T.J. Brickner Jr., in his official capacity as Vice-Chairman of the Oklahoma Health Care Authority, (6) RONALD ROUNDS, O.D, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (7) WAYNE HOFFMAN, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (8) JERRY HUMBLE, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (9) CHARLES ED McFALL, in his official capacity as Chairman of the Oklahoma Health Care Authority Board of Directors, (10) GEORGE MILLER, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, and (11) LYLE

ROGGOW, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors,

Defendants.

ANSWER

(Filed Aug. 23, 2001)

1. Defendants Mike Fogarty, in his official and individual capacities; Terri Fritz, in her official and individual capacities; Dr. Lynn Mitchell, in her official and individual capacities; and Dana Brown, in her official and individual capacities; T.J. Brickner, Jr., in his official capacity; Ronald Rounds, O.D., in his official capacity; Wayne Hoffman, in his official capacity; Jerry Humble, in his official capacity; Charles Ed McFall, in his official capacity; George Miller, in his official capacity; and Lyle Roggow, in his official capacity ("Defendants" hereafter) deny each and every allegation in Plaintiffs' First Amended Complaint except as admitted herein.

2. Defendants note that the Court has dismissed all actions seeking monetary damages against Official Capacity Defendants, making unnecessary response to allegations about Defendants in their official capacities related solely to monetary damages.

3. Defendants note that the Court has completely dismissed Counts II, III, VI, VII, and VIII of the Amended Complaint ("Complaint" hereafter),

making unnecessary response to allegations in those counts.

4. Defendants note that the Court has dismissed Count V insofar as it alleges a violation of 42 U.S.C. § 1396a(a)(13), making unnecessary response to allegations reliant on such statute in that count.

5. Defendants admit Plaintiffs brought this action pursuant to 42 U.S.C. § 1983. Defendants deny that section creates any rights, and Defendants deny the remaining allegations in Complaint ¶ 1.

6. Complaint ¶¶ 4, 5, 8 through 17, 30, 32, 35 through 42, 57, 64 through 75, and 85 through 103 require no response.

7. Defendants are without knowledge or information sufficient to admit or deny the responsibilities of Alfred Milton Evans ("Evans" hereafter) for Southeastern Oklahoma Family Services ("SOFS" hereafter) and therefore deny allegations about such. On information and belief, Defendants admit the remaining allegations in Complaint ¶ 6.

8. Defendants admit Complaint ¶¶ 7, 18 through 20, 23 through 29, 31, 50

9. Defendants deny Brown is a "quasi-lobbyist" but admit the remaining allegations in Complaint ¶ 21.

10. Defendants admit Fogarty, Fritz, Mitchell and Brown acted within the scope of their employment. The first sentence of Complaint ¶ 22 requires no response. Defendants deny the remaining allegations in Complaint ¶ 22.

11. Defendants admit behavioral health services provided by entities such as Texoma Mental Health Services, Inc., ("Texoma" hereafter) and SOFS must be pre-authorized and that such pre-authorization is performed by the Oklahoma Foundation for Medical Quality. Defendants deny the remaining allegations in Complaint ¶ 33.

12. Defendants admit Community Mental Health Centers conduct their own pre-authorization reviews pursuant to Oklahoma Health Care Authority ("OHCA" hereafter) requirements, subject to OHCA review and audit. Defendants deny the remaining allegations in Complaint ¶ 34.

13. Defendants are without knowledge or information sufficient to admit or deny when Evans formed Texoma and therefore deny allegations related to such but admit the remaining allegations in Complaint ¶ 43.

14. Defendants are without knowledge or information sufficient to admit or deny Complaint ¶¶ 46, 47, and therefore deny the same.

15. Defendants admit OHCA did not renew Texoma's Medicaid provider agreement and chose to do so without stating a cause. Defendants admit Texoma's remaining billing was required to be performed manually. Defendants admit many providers use electronic claims filing. Defendants deny the remaining allegations in Complaint ¶ 48.

16. Defendants are without knowledge or information sufficient to admit or deny that Evans hid his alleged ownership of SOFS and therefore deny the same. Defendants admit that when Evans filed this action they became aware of Evans's interest. Defendants deny the remaining allegations in Complaint ¶ 51.

17. Defendants admit Evans made a request for documents. Defendants admit OHCA audited SOFS. Defendants deny any connection between the request and the audit. Defendants deny the remaining allegations in Complaint ¶ 52.

18. Defendants deny "supervisor audits" occurred. Defendants admit the remaining allegations in Complaint ¶ 54.

19. Defendants admit OHCA served SOFS notice of contract termination as provided by the contract between them. Defendants deny any connection between Evans's request for documents and the termination notice. Defendants deny the remaining allegations in Complaint ¶ 55.

20. Defendants are without knowledge or information sufficient to admit or deny the subject of Evans's or SOFS's speech, if any, as alleged in Complaint ¶ 61 and therefore deny the same. Defendants deny the remaining allegations in Complaint ¶ 61.

AFFIRMATIVE DEFENSE

Defendants are immune from suit and liability under the doctrine of qualified immunity.

Respectfully submitted,

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FILED
APR 3 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-980

IN THE
Supreme Court of the United States

MICHAEL FOGARTY AND TERRIE FRITZ,
Petitioners,

v.

ALFRED MILTON EVANS, SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC., RUSTLING WINDS, INC., MORNING STAR MENTAL HEALTH SERVICES, INC., DIVERSIFIED FAMILY SERVICES, INC., SERENITY SPRINGS MENTAL HEALTH SERVICES, L.L.C., JCH, INC., NEAL THRIFT, NANCY GRAVES-THRIFT, JOHN MAJORS, CYNTHIA MAJORS, CHARLES PARKHURST, MARY PARKHURST, LEROY WHEELER, AND JOEL HOLCOMB,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Petition in this case presents three important questions involving the circumstances under which public officials responsible for administering complex government programs may be subjected to ruinous personal liability when sued by contractors disappointed by the effect of generally applicable efforts to reduce the cost of those programs. Having faced two trials in this case, Petitioners, two state officials responsible for running Oklahoma's Medicaid program, stand liable for nearly $1 million in punitive damages that were reinstated by the court of appeals when it reversed the district court's new trial order. Petitioners also face the prospect of yet a third trial on compensatory damages for certain Respondents and remitittur proceedings on awards to others because the court of appeals agreed that the compensatory awards to those Respondents (by the same jury that issued the punitive damages award) were "speculative, remote, imaginary, or impossible of ascertainment." Pet. App. 52a.

The discussion in Respondents' brief in opposition confirms that the courts of appeals are divided on two of the questions presented, involving the circumstances under which the courts deem a qualified immunity defense waived, and the degree of scrutiny that the appellate courts apply to their review of a district court's new trial grant. The importance of these questions is underscored by the third question, which asks whether the court of appeals was correct to reinstate the nearly $1 million punitive damages award while remitting or

remanding almost the entire compensatory damages award.

ARGUMENT

1. The qualified immunity question presented in the Petition warrants this Court's review.

The Tenth Circuit held that although Petitioners raised qualified immunity in motions to dismiss and in their answers, they waived the defense by omitting it from the pretrial order, and thus were not entitled to consideration of the issue on appeal. Pet. App. 16a-17a n.9. As the Petition shows (Pet. 14-21), this ruling conflicts with three courts of appeals, which have held that affirmative defenses not in the pretrial order are not waived when they have already been denied by the trial court, *Calderon* v. *Witvoet*, 999 F.2d 1101, 1108 (7th Cir. 1993), and that qualified immunity in particular is not waived when not listed in the pretrial order, *Guzman-Rivera* v. *Rivera-Cruz*, 98 F.3d 664, 669 (1st Cir. 1996); *Spann* v. *Rainey*, 987 F.2d 1110, 1113 (5th Cir. 1993). The ruling is also in tension with decisions of courts of appeals that have reviewed qualified immunity on appeal although the defense was not properly raised below. *Alexander* v. *Fulton County, Ga.*, 207 F.3d 1303, 1320 & n. 10 (11th Cir. 2000); *Kelly* v. *City of Oakland*, 198 F.3d 779, 784 (9th Cir. 1999); *O'Connor* v. *Huard*, 117 F.3d 12, 17 (1st Cir. 1997).

A. The qualified immunity question is not moot.

Contrary to Respondents' arguments, the Tenth Circuit's reinstatement of the first trial verdict

(which Petitioners also challenge) does not moot the qualified immunity question. In the court of appeals, Petitioners sought review of both the district court's denial of their motions to dismiss based on qualified immunity *before* the first trial as well as its refusal to consider a summary judgment motion *after* the first trial and before the second trial. Fogarty App. Br. at 22-25; Fritz App. Br. at 41-44. Petitioners argued that the district court improperly denied the defense, and that the court of appeals should hold that they were entitled to qualified immunity. Fogarty App. Br. at 22-25; Fritz App. Br. at 41-44.

That the trial court's qualified immunity rulings before and after the first trial were both at issue in the Tenth Circuit is shown by that court's discussion of both issues. *See* Pet. App. 16a-17a n. 9. The Tenth Circuit held that Petitioners' qualified immunity defense *before* the first trial was waived because it was not included in the pretrial order, and declined to decide, in light of its reversal of the new trial grant, whether Petitioners' qualified immunity motion *after* the first trial should have been granted. *Id.*

In any case, even if the Tenth Circuit had addressed qualified immunity only with respect to the second trial, Petitioners have also challenged the court's conclusion that the grant of a new trial was in error. The issue is therefore appropriately presented to this Court for review.

B. The circuits are split on the qualified immunity issue.

The court's holding that qualified immunity was waived before the first trial and its accordant

refusal to consider the defense implicate the circuit split articulated in the Petition. Respondents recognize that the courts of appeals differ as to the circumstances under which they will deem qualified immunity waived, admitting that "the stage at which qualified immunity is deemed waived varies, depending on the court," and that "[s]ome courts allow defendants to assert qualified immunity" at stages of the proceedings when "others deem the defense waived." Opp. 16. Indeed, as shown in the Petition, three courts of appeals, contrary to the Tenth Circuit here, would have found that Petitioners did not waive the defense by failing to include it in the pretrial order. An additional two circuits would have reviewed Petitioners' qualified immunity claim for clear error.

The division between the Tenth Circuit and other courts of appeals is most clearly demonstrated in the Seventh Circuit's decisions holding that "[n]othing in the Rules of Civil Procedure tells counsel that to preserve issues for appeal they must insert into the pretrial order contentions that have already been rejected by the judge." *Calderon*, 999 F.2d at 1108; *see also Nagy* v. *Riblet Prods. Corp.*, 79 F.3d 572, 575 (7th Cir. 1996). Respondents do not attempt to distinguish these cases, suggesting instead that the pretrial order was not dispositive and that "the Tenth Circuit found that Petitioners had waived [qualified immunity] because they had neglected to press it *at every opportunity*." Opp. 5 (emphasis added). But the court of appeals' opinion was clear that "Defendants must diligently raise the defense during pretrial proceedings *and ensure it is included in the pretrial order*." Pet. App. 17a n.9

(emphasis added). Because Petitioners did raise the defense in their answers and in motions to dismiss, the court necessarily found the omission of the defense from the pretrial order waived the issue. Moreover, contrary to Respondent's suggestion (Opp. 10), nothing in the rules of civil procedure requires a party to file a motion for summary judgment to preserve its defenses. *See* Fed. R. Civ. P. 56(b).

The holding also conflicts with decisions of the First and Fifth Circuits, which have held that qualified immunity was not waived when not listed in the pretrial order. *Guzman-Rivera*, 98 F.3d at 669; *Spann*, 987 F.2d at 1113. Respondents' attempts to distinguish these cases are unpersuasive.

In *Guzman-Rivera*, the defendants "failed to mention qualified immunity" in the pretrial order, asserting the defense for the first time days before a trial was set to begin. 98 F.3d at 669. The First Circuit held that the defendants' delay justified deeming qualified immunity waived for the pretrial stage of the case, but stated that its "decision does not imply, however, that the defense has been waived for other stages of the litigation," including trial and presumably appeal. *Id.* Respondents attempt to distinguish the decision by asserting that Petitioners failed to raise qualified immunity at trial (Opp. 12-13), but *Guzman-Rivera* was decided on interlocutory appeal before trial. *Guzman-Rivera* thus held that qualified immunity would still be available to defendants in later stages of the case despite its omission from the pretrial order, while the Tenth Circuit's decision here was that such omission waived the defense for the remainder of the proceedings.

Respondents' discussion of the First Circuit's decision in *O'Connor* v. *Huard* is even less persuasive. Respondents agree that the First Circuit "reviewed the denial [of qualified immunity] for plain error" because "the defendant had not properly preserved the defense." Opp. 13 (emphasis omitted). Respondents do not say how that ruling—an appellate court's review of a denial of qualified immunity on the merits despite finding it was not properly raised—does not conflict with the Tenth Circuit's decision holding that the failure to properly preserve the defense in a pretrial order foreclosed review.

In *Spann*, the Fifth Circuit similarly reviewed the denial of a qualified immunity defense after trial though it was not listed in the pretrial order. 987 F.2d at 1113-14 n.6. The court held that the interests that underlie qualified immunity are still served by allowing defendants to assert the defense after they have gone through discovery and a first trial. *Id.* at 1114. Importantly, while the district court in *Spann*, like the district court here, found that the defendant waived qualified immunity by failing to list it specifically in the pretrial order, the Fifth Circuit found this did *not* waive the defense. *Id.* at 1114 n.6.

Respondents' arguments regarding the Ninth and Eleventh Circuits in *Alexander* v. *Fulton County, Georgia*, and *Kelly* v. *City of Oakland* are likewise unavailing. Unlike the Tenth Circuit here, in both cases the courts reached the merits of a qualified immunity issue despite findings in the courts below that the issue was not properly raised. While Respondents are correct that the defendants in those

cases attempted to bring the issue before the court at different times than did Petitioners, that does not change the fact that in the Ninth or Eleventh Circuit, Petitioners would have received at least a plain error review of whether they were entitled to qualified immunity, while in the Tenth Circuit, they received no appellate review at all.

C. Petitioners are entitled to qualified immunity.

Respondents are incorrect that the Tenth Circuit's refusal to consider the merits of Petitioner's entitlement to qualified immunity was harmless. *See* Opp. 17-20.[1]

While Petitioners do not dispute that there is a clearly established right to petition the government, there is no clearly established right that lobbying activities exempt Respondents from the application of reasonable measures intended to reduce the rising costs of an important and complex government program. Petitioners, who are responsible for just such a program, exemplify the kind of public officials for whom qualified immunity was created, and the Respondents' allegations exemplify the type of discretionary decisions that are ordinarily shielded from liability by qualified immunity.

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[1] The district court's initial position that there was an "uncanny correlation" between Respondent's speech and retaliatory audits was based on evidence that the district court and even the Tenth Circuit later rejected as "simply too speculative to prove personal participation or causation as to any of the defendants." Pet. App. 31a.

Medicaid, the primary source of health care for the needy in the United States, is one of the largest and fastest growing programs of the federal government and of the States. Managing that growth, and controlling its cost, is among the most difficult and important issues facing State governments today. Officials like Petitioners are the States' first line of defense against spiraling costs, and bear the initial responsibility for increasing the efficiency and reducing the costs of their State's program. Even as State officials seek to control the costs of Medicaid, however, their efforts are opposed by Medicaid providers seeking an ever greater share of the pie. In recent years, providers like Respondents have increasingly turned to the courts when they are disappointed that their share of Medicaid funds is less than they desire. Providers have sued State Medicaid agencies and also the officials who administer those agencies, in their official and personal capacities. *See, e.g.*, *Pediatric Specialty Care, Inc.* v. *Arkansas Dep't of Human Servs.*, 293 F.3d 472 (8th Cir. 2002), *order inviting the Solicitor General to file a brief expressing the views of the United States sub nom Selig* v. *Pediatric Specialty Care*, 127 S.Ct. 1356 (Feb. 20, 2007).

Absent a meaningful application of qualified immunity principles, such suits have the potential to materially impede States' efforts to deal with rising Medicaid costs. Accordingly, the Tenth Circuit's holding that Petitioners' qualified immunity defense was waived is far from harmless.

2. The circuits are split on the standard of review for overturning a district court's new trial grant.

The petition presents a second question upon which the courts of appeals are split; namely, whether a court of appeals should employ closer scrutiny when reviewing a district court's grant of a motion for a new trial than the ordinary abuse of discretion standard. The Petition shows that the Tenth Circuit, in accord with the decisions of four other circuits, applies more stringent scrutiny, while five circuits apply an ordinary abuse of discretion standard. Pet. 21-24.[2] Respondents attempt to paint the circuits' schism as a mere semantic difference, but the Brief in Opposition demonstrates that the opposite is true: While the courts of appeals all *label* their standard of review "abuse of discretion," the *substance* of the courts' review varies significantly. Indeed, Respondents admit that "some circuit courts examine the evidence more closely than others" when reviewing a grant of a new trial. Opp. 24. As the Eleventh Circuit candidly remarked, "the label 'abuse of discretion' belies the standard of review that we actually apply to grants of motions for a new trial." *Butcher* v. *United States*, 368 F.3d 1290, 1297 (11th Cir. 2004).

Respondents attempt to smooth over the differing standards that the courts of appeals apply

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[2] In addition, Petitioners agree that the Third Circuit applies "a closer degree of scrutiny," and should be added to the courts that agree with the Tenth Circuit. *See* Opp. 25-26, quoting *Wilburn* v. *Maritrans GP*, 139 F.3d 350, 363 (3d Cir. 1998).

by asserting that ordinary abuse of discretion review is actually the same as the "more stringent scrutiny" (Tenth Circuit), the "closer degree of scrutiny," (Third and Sixth Circuits), the "more searching inquiry" (D.C. Circuit), and the review that is "not much different" from *de novo* (Eleventh Circuit), applied by certain courts of appeals. *See* Pet. 25-27; Opp. 25-26.

While acknowledging these courts' heightened standard of review, Respondents' arguments with regard to other circuits miss the mark. Their First Circuit authority is irrelevant to the issue presented here because it is a criminal case. *See* Opp. 24, citing *United States* v. *Rivera Rangel*, 396 F.3d 476 (1st Cir. 2005). Criminal cases are governed by an entirely different set of rules, and implicate constitutional rights of the accused that are irrelevant in civil trials.

Respondents quote the Second Circuit's statement that it applies "particularly close" scrutiny out of context; in the same sentence from which Respondents quote, the court states that its standard is whether there is "'*any basis in reason* for the trial judge's conclusion as to the weight of the evidence.'" *Crane* v. *Consol. Rail Corp.*, 731 F.2d 1042, 1048 (2d Cir. 1984) (emphasis added); *see also id.* (affirming new trial grant because "we cannot say that there was 'no basis in reason'" for the ruling). The Second Circuit does not apply the close scrutiny of the Tenth and other circuits.

Respondents discussion of the Fourth and Fifth Circuits (Opp. 26-27) lends no support to their contention that these circuits apply heightened scrutiny, because Respondents cite only unpublished

decisions, not binding on future panels, that are contrary to those courts' stated standards (*see* Pet. 24).

Moreover, Respondents admit that the Seventh Circuit expressly "abandon[ed]," in light of this Court's ruling in *Gasperini*, the practice of examining new trial grants more closely than denials, *Medcom Holding Co.* v. *Baxter Travenol Labs.*, 106 F.3d 1388, 1397 & n.3 (7th Cir. 1997), and that the Eighth Circuit "does not speak in terms of 'closer scrutiny' or 'more stringent scrutiny.'" Opp. 27-28.

Accordingly, even under Respondents' view, "some circuit courts examine the evidence more closely than others" when reviewing a district court's decision to grant a new trial. Opp. 24. Respondents attempt to minimize the differences between the courts, but the Tenth Circuit's application of "more stringent scrutiny" made a difference in this case. *See* Pet. 12-13. The court of appeals' opinion, and its decisions to grant judgment as a matter of law and to order remititur of nearly all of the compensatory damages, show that it had serious questions about the jury's verdict. Nevertheless, under the "stringent scrutiny" standard, and on its own cold reading of the paper record, the court overturned the district court's new trial grant. The standard of review applied by the court of appeals warrants this Court's review.

3. The court of appeals' reinstatement of punitive damages.

The court of appeals reinstated nearly $1 million in punitive damages while remitting or

remanding nearly all of the $33 million compensatory damages award. That ruling is in sharp tension with this Court's holding that there must be a "reasonable relationship" in a punitive damages award's "ratio to the actual harm inflicted on the Plaintiff." *BMW N. Am., Inc.* v. *Gore*, 517 U.S. 559, 580 (1996). Respondents suggest that the reinstated punitive damages award is reasonable in light of the ratio between the award and their estimate of the probable compensatory award after remand and remititur. Opp. 30-35. But Respondents do not take into account that the punitive damages award was made by the same jury at the same time as the compensatory damages awards that were found to be excessive. The error that infected the jury's compensatory award most certainly also infected its punitives award.

Moreover, because the compensatory awards have been mostly or entirely overturned, it is meaningless to compare the exemplary award and the eventual compensatory award after remititur and a third damages trial. Because the two awards would be decided by different juries considering different testimony, there can be no "reasonable relationship" between them. The relationship that Respondents suggest is simply a post-hoc numerical comparison, which leaves no basis for determining whether the award meets constitutional muster. This Court has "constantly rejected" the suggestion Respondents now assert, that the constitutionality of a punitive damages award may be measured "by a simple mathematical formula." *BMW*, 517 U.S. at 582.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2008

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